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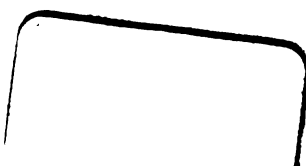
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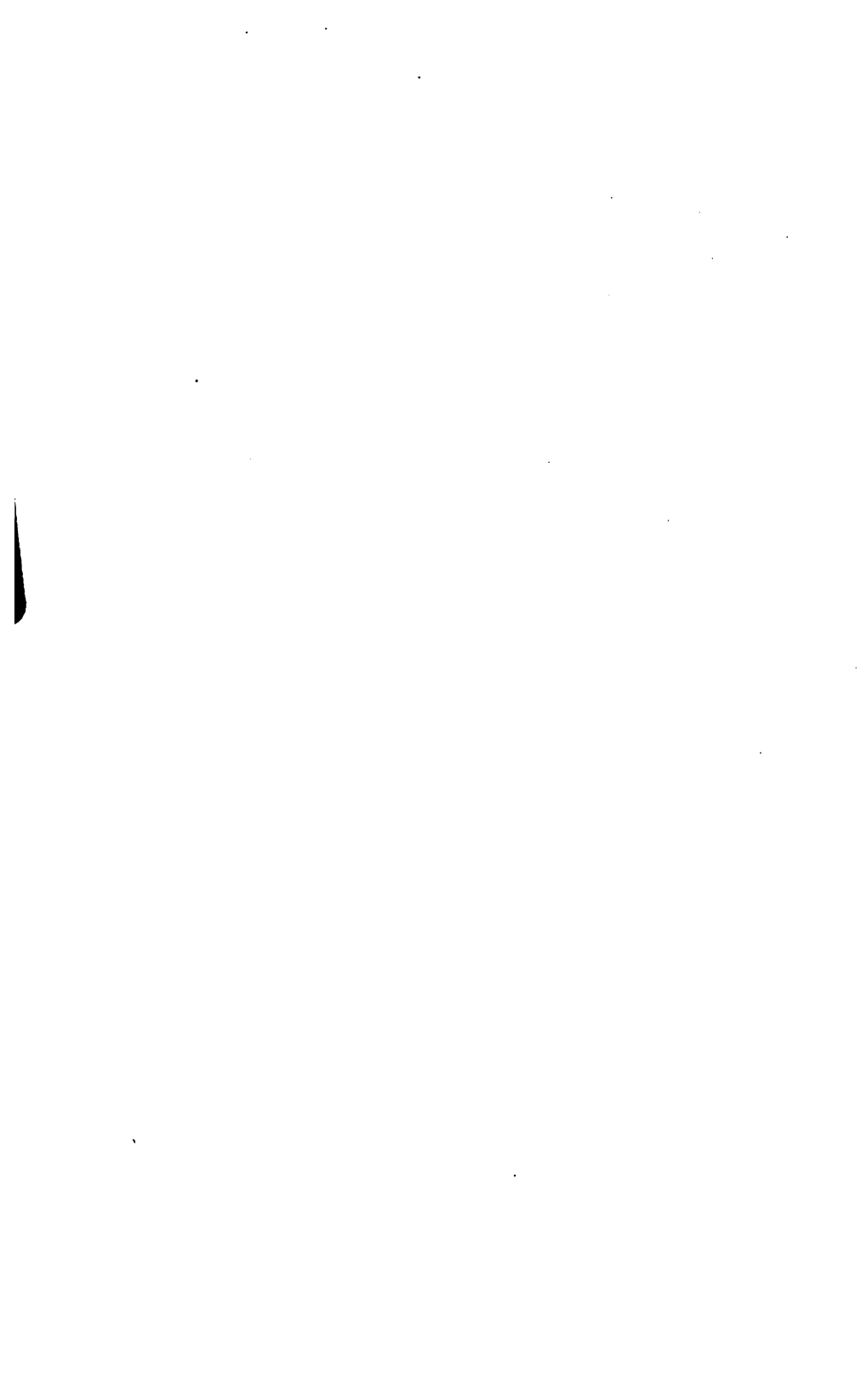
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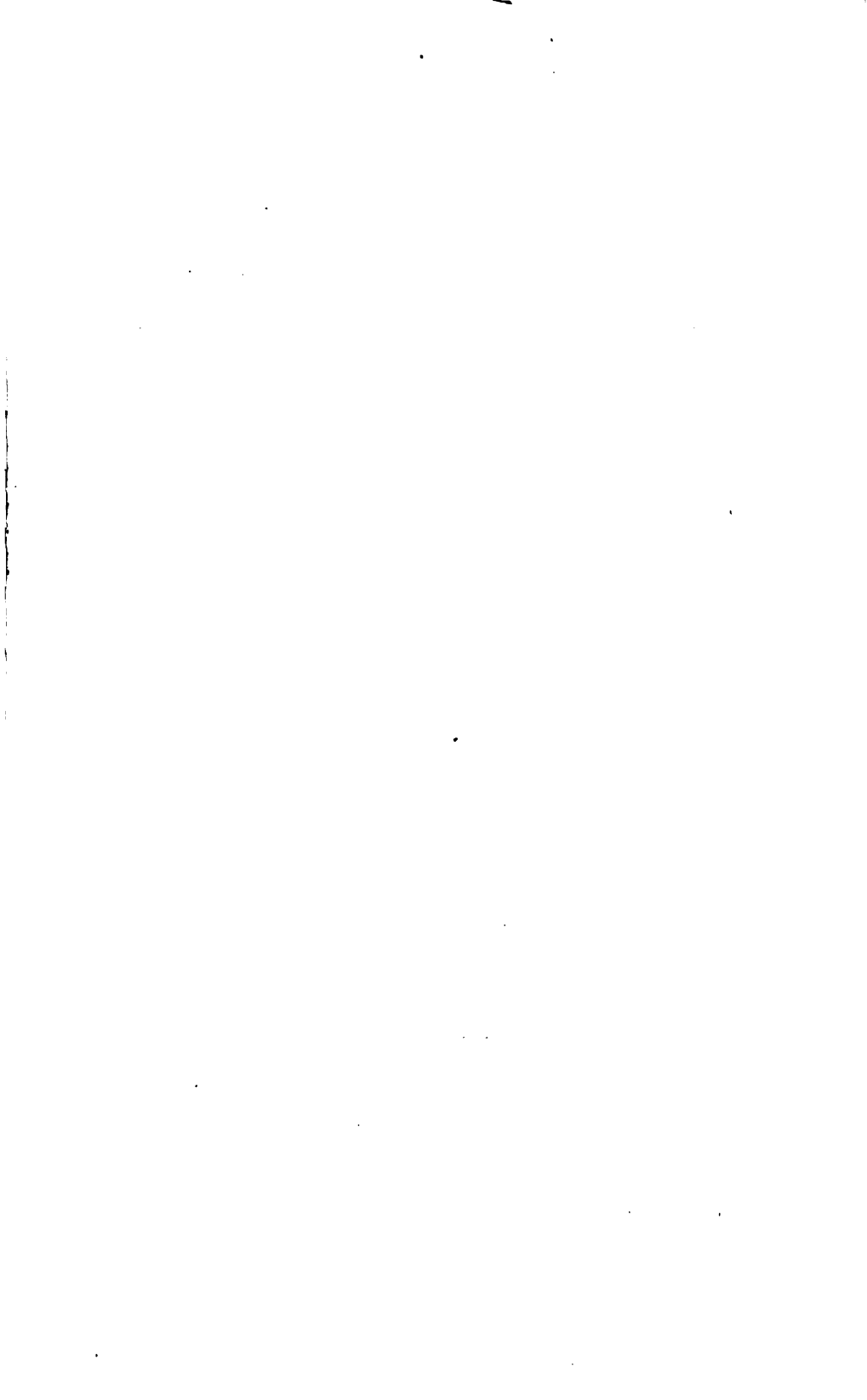


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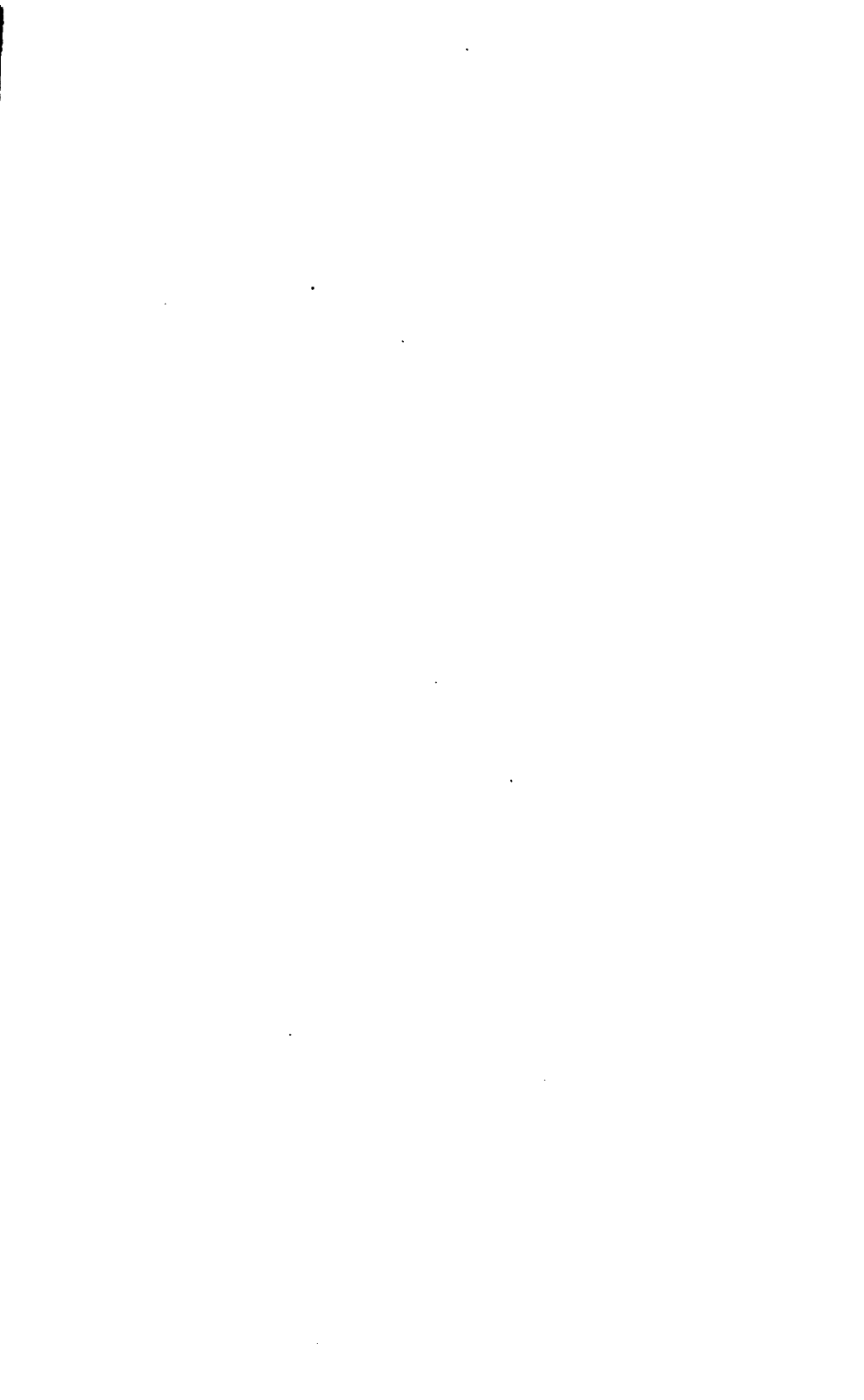
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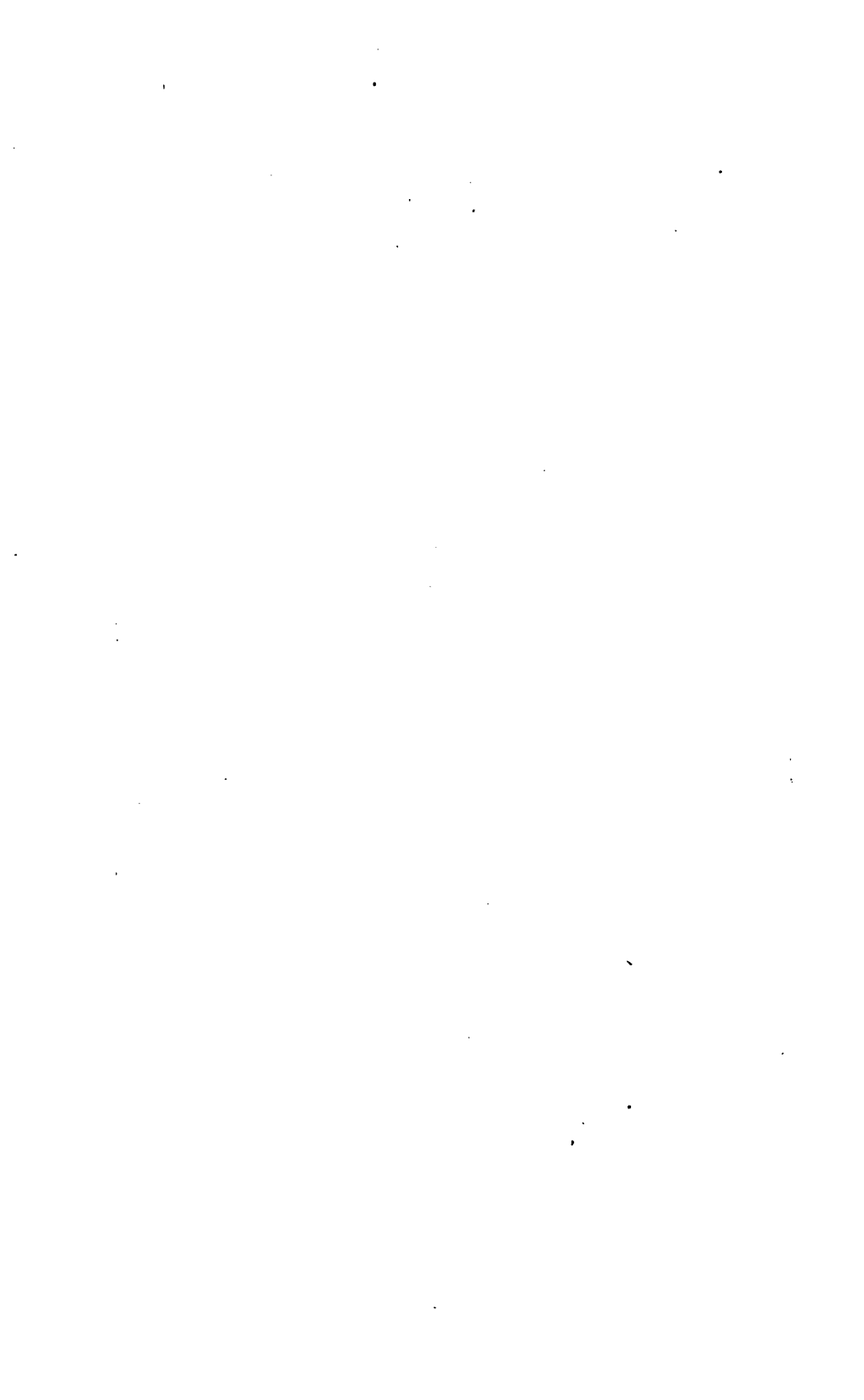












REPORTS OF CASES
DETERMINED IN THE
APPELLATE COURTS
OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO APRIL 10, 1915, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CXCI
A. D. 1915.

LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, MARCH 11, 1915.
SECOND DISTRICT, JANUARY 6, 1915.

EDITED BY
THE PUBLISHERS' EDITORIAL STAFF

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1915

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AUG 16 1915

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO APRIL 10, 1915.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—ALBERT WATSON.....Mt. Vernon.

Second District—WILLIAM M. FARMER.....Vandalia.

Third District—FRANK K. DUNN.....Charleston.

Fourth District—GEORGE A. COOKE.....Aledo.

Fifth District—CHARLES C. CRAIG.....Galesburg.

Sixth District—JAMES H. CARTWRIGHT.....Oregon.

Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Ashland Block, Chicago.

EDWARD O. BROWN, Presiding Justice, Ashland Block, Chicago.

WM. H. MCSURELY, Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

BRANCH B.*

ALBERT C. BARNES, Presiding Justice, Ashland Block, Chicago.

MARTIN M. GRIDLEY, Justice, Ashland Block, Chicago.

FREDERICK A. SMITH, Justice, Ashland Block, Chicago.

BRANCH C.**

JAMES S. BAUME, Presiding Justice, Galena.

WARREN W. DUNOAN, Justice, Marion.

EMERY C. GRAVES, Justice, Geneseo.

BRANCH D.**

JOSEPH H. FITCH, Presiding Justice, Ashland Block, Chicago.

KICKHAM SCANLAN, Justice, Ashland Block, Chicago.

HUGO PAM, Justice, Ashland Block, Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

GEORGE W. THOMPSON, Presiding Justice, Galesburg.

EDGAR ELDREDGE, Justice, Ottawa.

WILLIAM B. SCHOLFIELD, Justice, Marshall.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 188, J. & A. § 2981.

** Established under act of June 6, 1911, J. & A. § 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

JAMES C. McBRIDE, Presiding Justice, Taylorville.

HARRY HIGHER, Justice, Pittsfield.

THOMAS M. HARRIS, Justice, Lincoln.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: ENOCH E. NEWLIN, Robinson.

WILLIAM H. GREEN, Mt. Vernon.

JACOB R. CREIGHTON, Fairfield.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNHEUTER, Nashville.

GEORGE A. CROW, East St. Louis.

WILLIAM E. HADLEY, Collinsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: ALBERT M. ROSE, Louisville.

JAMES C. McBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

Judges: WILLIAM B. SCHOLFIELD, Marshall.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

* Laws 1897, 188, J. & A. § 3070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

Judges: WILLIAM G. COCHRAN, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: JAMES A. CREIGHTON, Springfield.
FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBER, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria
THEODORE N. GREEN, Pekin.
NICHOLAS E. WORTHINGTON, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
ARTHUR W. DESELM, Kankakee.
FRANK L. HOOPER, Watseka.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: ROBERT W. OLMSTEAD, Rock Island.

FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: RICHARD S. FARRAND, Dixon.

JAMES S. BAUME, Galena.

OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.

DUANE J. CAENES, Sycamore.

MAZZINI SLUSSER, Downers Grove.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.

CHARLES H. DONNELLY, Woodstock.

CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—FRANK J. WALSH, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—JOHN W. RAINEY, County Building, Chicago.

JUDGES.

EDWARD O. BROWN,
RICHARD S. TUTHILL,
JESSE A. BALDWIN,
FRANK BAKER,
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,

JOHN GIBBONS,
ADELOR J. PETT,
LOCKWOOD HONOR,
GEORGE KERSTEN,
JOHN P. MCGOERTY,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—RICHARD J. McGRATH, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
THEODORE BRENTANO,
RICHARD E. BURKE,
THOMAS C. CLARK,
WILLIAM FENIMORE COOPER,
WILLIAM E. DEVER,
MARTIN M. GRIDLEY,
CHARLES A. McDONALD,

MARCUS A. KAVANAGH,
JOSEPH H. FITCH,
HENRY V. FREEMAN,
ALBERT C. BARNES,
HUGO PAM,
M. L. MCKINLEY,
CLARENCE N. GOODWIN,
CHARLES M. FOELL,
DENIS E. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge.

ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge.

W. C. FLANNIGAN, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge.

JOHN LISTMANN, Clerk.

THE CITY COURT OF CANTON.

H. C. MORAN, Judge.

ERNEST HIPSLEY, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge.

GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge.

CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge.

EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

JOHN A. DOWDALL, Judge.

JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge.

HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

ROBERT H. FLANNIGAN,

W. M. VANDEVENTER, Judges.

WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge.

CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge.

JACK MELLON, Clerk.

THE CITY COURT OF HARRISBURG.

WM. H. PARISH, JR., Judge. HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge. WM. R. KEE, Clerk.

THE CITY COURT OF KEWANEE.

H. STERLING POMEROY, Judge. CHARLES L. ROWLEY, Clerk.

THE CITY COURT OF LITCHFIELD.

DAN W. MADDOX, Judge. LAURETTA SALZMAN, Clerk.

THE CITY COURT OF MACOMB.

JOSIE WESTFALL, Judge. WM. B. MARTIN, Clerk.

THE CITY COURT OF MARION.

W. O. POTTER, Judge. GEO. T. CARTER, Clerk.

THE CITY COURT OF MATTOON.

JOHN McNUTT, Judge. THOMAS M. LYTLE, Clerk.

THE CITY COURT OF MOLINE.

G. O. DIETZ, Judge. GEO. A. SCHRADER, Clerk.

THE CITY COURT OF PANA.

J. H. FORNOFF, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF SPRING VALLEY.

WILLIAM HAWTHORNE, Judge. WILLIAM H. BURNELL, Clerk.

THE CITY COURT OF STERLING.

CARL E. SKELDON, Judge. EARL L. HESS, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. T. 3313 *et seq.*

FRANK P. DANISCH, Clerk.

CHIEF JUSTICE,
HARRY OLSON.

ASSOCIATE JUDGES.

HARRY M. FISHER
EDWARD T. WADE
JOHN K. PRINDIVILLE
JOSEPH P. RAFFERTY
JOHN COURTNEY
JOHN J. SULLIVAN
JOHN A. MAHONEY
WILLIAM N. GEMMILL
FRANK H. GRAHAM
DAVID SULLIVAN

HUGH J. KEARNS
JOSEPH S. LABUY
JOHN R. NEWCOMER
JOHN R. CAVERLY
CHAS. A. WILLIAMS
JACOB H. HOPKINS
HARRY P. DOLAN
JOSEPH SABATH
JAMES C. MARTIN
ARNOLD HEAP

JOHN J. ROONEY
SAMUEL H. TRUDE
JOSEPH E. RYAN
EDMUND K. JARECKI
CHARLES N. GOODNOW
PATRICK B. FLANAGAN
DENNIS W. SULLIVAN
SHERIDAN E. FRY
JOHN STELK
JOSEPH Z. UHLIR

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermilion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. ¶ 3259.

JUDGES.	COUNTIES.	COUNTY SEATS.
LYMAN McCARL.....	Adams.....	Quincy.
MILES F. GILBERT.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau.....	Princeton.
JOHN DAY, JR.....	Calhoun.....	Hardin.
ARTHUR J. GRAY.....	Carroll.....	Mt. Carroll.
CHARLES E. MARTIN.....	Cass.....	Virginia.
ROY C. FREEMAN.....	Champaign.....	Urbana.
CHARLES A. PRATER.....	Christian.....	Taylorville.
A. L. RUFFNER.....	Clark.....	Marshall.
JOHN L. BOYLES.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
THOMAS F. SCULLY.....	Cook.....	Chicago.
HENRY HORNER, PRO. J.....	Cook.....	Chicago.
DUANE GAINES.....	Crawford.....	Robinson.
STEPHEN B. RARIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamora.
FRED C. HILL.....	DeWitt.....	Clinton.
D. H. WAMSLEY.....	Douglas.....	Tuscola.
S. J. RATHJE.....	DuPage.....	Wheaton.
DANIEL V. DAYTON.....	Edgar.....	Paris.
PETER C. WALTERS.....	Edwards.....	Albion.
BARNES OVERBECK.....	Effingham.....	Effingham.
FRED C. MEYERS.....	Fayette.....	Vandalia.
M. L. McQUISTON.....	Ford.....	Paxton.
NEALY I. GLENN.....	Franklin.....	Benton.
ROBERT S. BOYD.....	Fulton.....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE BEDFORD.....	Grundy.....	Morris.
J. S. SNEED.....	Hamilton.....	McLeansboro.
EL. W. DUNHAM.....	Hancock.....	Carthage.
HENRY M. WINDERS.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
LEONARD E. TELLEN.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
HARRY W. POGUE.....	Jersey.....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson.....	Vienna.
S. N. HOOVER.....	Kane.....	Geneva.
JOHN H. WILLIAMS, PRO. J.....	Kane.....	Geneva.
JAY H. MERRILL.....	Kankakee.....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall.....	Galesburg.
R. C. RICE.....	Knox.....	Yorkville.
PERRY L. PERSONS.....	Lake.....	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.

JUDGES.	COUNTIES.	COUNTY SEATS.
ALBERT T. LARDIN, Pro. J....	La Salle.....	Ottawa.
OTTO W. LONGNECKER.....	Lawrence.....	Lawrenceville.
JOHN B. CRABTREE.....	Lee.....	Dixon.
B. R. THOMPSON.....	Livingston.....	Pontiac.
CHARLES J. GEHLBACH.....	Logan.....	Lincoln.
JOHN H. MCCOY.....	Macon.....	Decatur.
ANDREW J. DUGGAN.....	Macoupin.....	Carlinville.
H. B. EATON.....	Madison.....	Edwardsville.
JOSEPH P. STREUBER, Pro. J....	Madison.....	Edwardsville.
WILLIAM G. WILSON.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
CHARLES I. IMES.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
JAMES C. RILEY.....	McLean.....	Bloomington.
JESSE M. OTT.....	Menard.....	Petersburg.
F. L. CHURCH.....	Mercer.....	Aledo.
HENRY SCHNEIDER.....	Monroe.....	Waterloo.
T. J. McDAVID.....	Montgomery.....	Hillsboro.
WM. E. THOMSON.....	Morgan.....	Jacksonville.
JOHN T. GRIDER.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
CLYDE E. STONE.....	Peoria.....	Peoria.
WALTER A. CLINCH, Pro. J....	Peoria.....	Peoria.
LOUIS R. KELLY.....	Perry.....	Pinckneyville.
WM. A. DOSS.....	Platt.....	Monticello.
PAUL F. GROTE.....	Pike.....	Pittsfield.
BENJ. F. ANDERSON.....	Pope.....	Golconda.
FRED HOOD.....	Pulaski.....	Mound City.
IRVING E. BROADBUSH.....	Putnam.....	Hennepin.
WM. M. SCHUWERK.....	Randolph.....	Chester.
ROBT B. WITCHER.....	Richland.....	Olney.
NELS A. LARSON.....	Rock Island.....	Rock Island.
BENJ. S. BELL, Pro. J.....	Rock Island.....	Rock Island.
CHAS. D. STILWELL.....	Saline.....	Harrisburg.
JOHN B. WEAVER.....	Sangamon.....	Springfield.
C. H. JENKINS, Pro. J.....	Sangamon.....	Springfield.
JOHN C. WORK.....	Schuyler.....	Rushville.
F. C. FUNK.....	Scott.....	Winchester.
A. J. STEIDLEY.....	Shelby.....	Shelbyville.
FRANK THOMAS.....	Stark.....	Toulon.
JOSEPH B. MESSICK.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ROSCOE J. CARNAHAN.....	Stephenson.....	Freeport.
JAMES M. RAHN.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
LAWRENCE T. ALLEN.....	Vermilion.....	Danville.
W. J. BOOKWALTER, Pro. J....	Vermilion.....	Danville.
W. S. WILLHITE.....	Wabash.....	Mt. Carmel.
L. E. MURPHY.....	Washington.....	Monmouth.
W. P. GREEN.....	Wayne.....	Nashville.
J. V. HEIDINGER.....	White.....	Fairfield.
J. M. ENDICOTT.....	Whiteside.....	Carmi.
WM. A. BLODGETT.....	Will.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITZHIAN, Pro. J....	Williamson.....	Joliet.
W. F. SLATER.....	Winnebago.....	Marion.
LOUIS M. RECKHOW.....	Warren.....	Rockford.
ARTHUR C. FORT.....	Woodford.....	Eureka.

APPELLATE COURT CASES PASSED ON BY THE SUPREME COURT.

As reviewed by the Supreme Court, showing the result of such review, whether affirmed, modified, dismissed or reversed, with references to the reports where such cases may be found. Table also shows cases in which certiorari has been applied for and denied, thus rendering the decision of the Appellate Court final. (See Sec. 121 Practice Act, J. & A. ¶ 8658.)

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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEARS 1914 AND 1915.

**Charles H. Mason, Defendant in Error, v. Erik L. Krag
and A. L. Thompson, Plaintiffs in Error.**

Gen. No. 19,207. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by Charles H. Mason against Erik L. Krag and A. L. Thompson to recover a sum claimed to be due on a promissory note executed by defendant to plaintiff, dated August 17, 1910, and payable to the order of plaintiff October 1, 1910, with six per cent. interest after maturity. A jury trial was waived and the court found for plaintiff in the sum of \$112.25. To reverse a judgment entered on the finding, defendants prosecute a writ of error.

JOHN J. LUPE, for plaintiffs in error.

Thorpe v. Weber et al., 191 Ill. App. 2.

CHARLES LANE, for defendant in error.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1414*—*when finding of trial court will not be disturbed.* Where no propositions of law were submitted, the findings of the court on the issues of fact are binding upon the Appellate Court the same as a verdict of a jury, when not manifestly against the weight of the evidence.

2. USURY, § 81*—*when cannot be urged on review.* Error of court in allowing usurious interest in a suit on a promissory note, cannot be urged on review where the record does not show the defense of usury was insisted upon by a plea, or a notice or claim of such defense in the trial court.

B. A. Thorpe, Defendant in Error, v. Max Weber and David B. Weber, Copartners, trading as Weber Brothers, Plaintiffs in Error.

Gen. No. 19,242. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by B. A. Thorpe against Max Weber and David B. Weber, trading as Weber Brothers, to recover for procuring a tenant for a hotel in Chicago for a period of ten years, at an annual rental of \$3,600. Plaintiff's claim was for five per cent. of the first year's rental and one per cent of the last eight years' rental. Plaintiff recovered a judgment for \$468. To reverse the judgment, defendants prosecute error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thorpe v. Weber et al., 191 Ill. App. 2.

The facts show that defendants sent out circulars and that plaintiff received one of them, which was signed "Weber Bros., 1924 State St." The circular contained these words:

"For rent, the following:

* * * Columbus Hotel, 1840 Wabash Ave.
60 Room Steam Heat, \$4,200 per annum.

Will pay real estate board commissions
for good tenants."

Thereafter plaintiff answered the circular by letter to defendants saying, in substance, that Mr. Deffler of plaintiff's office had interested Messrs. Schultz and Field, of the Inter-Ocean Hotel, and that they had made a substantial offer for a lease on the property, and asked defendants to kindly protect him with reference to the regular real estate board rate of commission and he would give the prospective lessees proper attention. Plaintiff then sent Deffler to defendants to confer with them and they accepted his services, and by his efforts the lease in question was consummated and signed by Field, one of the parties mentioned in defendant in error's letter.

It appeared that plaintiff was duly licensed as a real estate broker but that Deffler was not, and that a city ordinance of Chicago provided as follows:

"Any person employed by a person or corporation licensed as a broker under the provisions of this chapter who shall himself engage in the business or act in the capacity of a broker, shall notwithstanding the fact of such employment be amenable to all the provisions of this chapter and shall be required to take out a broker's license."

Defendants urged as ground for reversal of the judgment: (1) Because the contract for commissions was made by defendants and one Mr. Deffler, an unlicensed broker, on his own behalf, or with him as the agent of plaintiff, and that Mr. Deffler made the entire negotiations with the tenant, Stanley Field, and that the contract was against the provisions of the city ordinances and void; (2) that plaintiffs' claim is based

Thorpe v. Weber et al., 191 Ill. App. 2.

upon a *quantum meruit* and that there is no evidence to sustain such a claim; (3) that the evidence showed a contract with Deffler that the commission for obtaining the tenant should be for the exact sum of \$200.

A. L. WEBER, for plaintiffs in error; GEORGE F. ORT, of counsel.

HENRY HORNER, for defendant in error; ARNOLD HEAP, of counsel.

MR. JUSTICE DUNCAN delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 4*—*when ordinance does not require license of broker's employees.* A city ordinance requiring a license to be taken out by an employee of a broker where he shall himself engage in the business or act in the capacity of a broker, *held* not to apply to mere employees of brokers, though they are paid for their work a certain portion or per cent. of the commissions.

2. BROKERS, § 70*—*when suit for commissions not based on quantum meruit.* A suit for brokerage commissions *held* not based on a *quantum meruit* count, where the statement of claim simply discloses that plaintiff is suing for "real estate board commissions" promised in a circular letter, and specifies the claim further by stating the rental named in the lease and that the claim is for certain percentage of the annual rentals.

3. APPEAL AND ERROR, § 1506*—*when refusing to permit cross-examination harmless error.* Error of court in refusing to permit defendants to cross-examine some of plaintiff's witnesses *held* harmless where the witnesses were thereafter thoroughly examined by defendants with reference to all matters inquired of them by plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Standard Brewery, Plaintiff in Error, v. Charles A. Johnston, Defendant in Error.

Gen. No. 19,218. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by The Standard Brewery, a corporation, against Charles A. Johnston to recover \$1,000 which plaintiff claimed to be entitled to as liquidated damages because of a breach of the following contract:

"This agreement, witnesseth, that in consideration of the sum of \$600 in hand to him paid by the Standard Brewery, a corporation of Illinois, and the loaning to him by said Standard Brewery of a complete set of saloon fixtures, Charles A. Johnston, hereinafter designated as the vendee, hereby agrees to purchase from the Standard Brewery, a corporation of the State of Illinois, its successors and assigns, hereinafter called the vendor, and from no other person, firm or corporation, all the domestic beer sold by him or his agents or servants, at or about his saloon located at 3627 North Clark street, Chicago, Illinois, for cash on delivery at the rate of the usual market price of the Standard Brewery for beer, at the time of delivery, from the first day of November, 1907, to the 31st day of October, 1912, and that he will not sell or lease his said saloon to any person or persons who do not make an agreement similar to this with said vendor.

"In case said vendee, his heirs, successors or assigns shall fail or neglect to purchase all the domestic draft beer required by him or them, at said premises from the vendor, during the term above specified, or in case of any breach of this agreement on his part, then the said vendee or his heirs shall pay the said vendor \$1,000. If said vendee, his heirs, successors or as-

The Standard Brewery v. Johnston, 191 Ill. App. 5.

signs have domestic beer of other manufacture than that of the vendor's upon said premises it shall be taken and deemed to be conclusive evidence of a violation of this covenant and entitle said vendor to damages as herein specified.

"It is further agreed that said brewery will furnish said Johnston for his use during above said term a city saloon license, which said Johnston will from term to term assign to above said brewery, and return it to said brewery at the end of said five years.

"And by its acceptance hereof said vendor hereby agrees to sell to said vendee or his assignee all of the domestic beer of the manufacture of said vendor required by him in his saloon upon said premises, upon the above terms and conditions.

"(Signed)

CHARLES A. JOHNSTON (SEAL).

Accepted:

THE STANDARD BREWERY

(Signed) By August J. Dewes,

Vice-President."

It is not denied that defendant, after having for four years and a half faithfully performed all the covenants in the contract to be kept by him and when the contract had but six months more to run, violated the terms of the agreement by selling or renting his saloon to a person who did not enter into a contract with plaintiff of like import to the one sued on, and who did not buy all the domestic draft beer used in his business of plaintiff in error. On the trial plaintiff introduced the contract sued on, in evidence, and offered to prove facts from which the amount of the prospective profits of plaintiff in error for the six months during which defendant in error did not purchase from it all the domestic draft beer used in the saloon in question, if the contract had been performed, could be estimated. This proof was objected to by defendant and excluded by the court for the reason that plaintiff had limited itself in its affidavit of claim to recovery on the basis of liquidated damages. At the end of the case made by the plaintiff, the court instructed the jury to find the issues for the defendant. On the verdict returned in

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pursuance to that instruction, judgment was entered against plaintiff in bar of its action for costs. To reverse the judgment, plaintiff prosecutes error.

BAKER & HOLDER, for plaintiff in error.

FRED PLOTKE, for defendant in error.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 89*—*when sum named in contract shown to be intended as liquidated damages.* When a specific amount is named in a contract as damages to be paid in case of breach, it is a circumstance tending to show the intention to constitute that amount liquidated damages, provided the amount so named is based upon and substantially limited by just compensation.

2. DAMAGES, § 89*—*when sum named in contract will be construed as a penalty.* Unless a sum named in a contract as damages for a breach thereof is based and substantially limited by just compensation, and particularly when the amount is so grossly disproportionate to the amount of damages that could result from the breach as to be oppressive and unconscionable and extortionate, courts will declare the intention of the parties to provide a penalty, even though the words "liquidated damages" are used in the contract.

3. DAMAGES, § 89*—*when sum named in contract construed as penalty.* Where a saloon keeper and a brewing company entered into a contract whereby the former agreed for five years to purchase certain beer of the latter exclusively and not to sell or lease the saloon to any other who did not enter into a similar agreement, and the contract provided that in case of a breach thereof the saloon keeper was to pay the company \$1,000, the stipulated sum was construed as having been intended as a penalty instead of liquidated damages for the reason that the contract was to run for a period of years and that therefore the damages which would result would depend on the time of the breach, and to exact the sum named in case of a breach shortly before the expiration of the contract would be oppressive and unconscionable and not in accord with the idea of just compensation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Chicago Form Co. et al. v. Greenburg et al., 191 Ill. App. 8.

**Chicago Form Company and M. H. Cazier, Appellees,
v. George G. Greenburg and Henry Duckgeischel.
George C. Greenburg, Appellant.**

Gen. No. 19,246. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed December 31, 1914. Rehearing denied January 20, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Chicago Form Company, a corporation, and M. H. Cazier against George G. Greenburg and Henry Duckgeischel to recover for money paid out by plaintiff for the defendants.

The facts showed that defendants were about to form a corporation to be known as the "Green-Duck Company" for the manufacture of some metal specialties. Being desirous of securing the room described in the lease hereinafter mentioned, to be occupied by the Green-Duck Company when it should become incorporated, they induced M. H. Cazier, who was president of the plaintiff Company, to secure a lease thereof for them. The lease was to be taken in the name of the Chicago Form Company and M. H. Cazier, as lessees.

Cazier secured from one Warren Springer the lease desired for a term beginning December 1, 1906, and ending April 30, 1912, at a monthly rental of \$175, and paid the first month's rent therefor. On December 18, 1906, the following agreement in writing was executed;

"THIS AGREEMENT between the Chicago Form Company, and M. H. Cazier of Chicago, Illinois, parties of the first part, and George G. Greenburg and Henry Duckgeischel of Chicago, Illinois, parties of the second part.

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"WITNESSETH, that whereas the party of the first part has leased for a period beginning December 1, 1906, and ending April 30, 1912, from Warren Springer, certain tenement known as the fifth floor of No. 300 South Clinton street.

"It is agreed between the parties hereunto that the said premises shall be used and occupied, during the term aforesaid, or until otherwise contracted for by the parties hereunto, and all rents and damages claimed by the owner or landlord, shall be met and satisfied by the parties of the second part, and they do hereby agree to protect and save the said party of the first part from all liability arising out of said lease. This in consideration of their use and occupancy of the premises.

CHICAGO FORM COMPANY,
M. H. CAZIER,
GEO. G. GREENBURG,
HENRY DUCKGEISCHEL."

It seems to be conceded that Greenburg and Duckgeischel occupied the premises until the Green-Duck Company was incorporated which was in the early part of January, 1907; that the first month's rent was repaid to Cazier by Greenburg and Duckgeischel, and that after the Green-Duck Company was incorporated it occupied the premises until about January 31, 1910, and paid all the rent directly to Warren Springer, the landlord.

On April 24, 1911, by virtue of the power of attorney contained in the lease a judgment was confessed in the Municipal Court in favor of Springer, the landlord, and against plaintiffs for \$2,025 and costs, which was for eleven months' rent at \$175 per month, amounting to \$1,925 and \$100 attorney fees. The costs in that case were \$13, making the total amount of the judgment and costs \$2,038. Of this judgment appellant had notice, but there is nothing in the record to show that he ever took any steps either to have it vacated or to pay it or to prevent plaintiffs from being forced to pay it. This judgment was satisfied December 19,

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1911, and appellees' claim it was paid in full by them. Thereafter this suit was instituted. Plaintiffs in their affidavit of claim relied on the contract of December 18, 1906, heretofore set out and also on a claimed contract of January 8, 1907. The execution of the contract of January 8, 1907, was denied by appellant both in his affidavit of defense and on the witness stand. He also introduced in evidence a special finding by a jury in another case as tending to prove that it had not been executed. The court thereupon excluded from the consideration of the jury all evidence as to its execution. The jury found the issues against the defendants and assessed the plaintiffs' damages at \$2,038. From a judgment on this verdict, defendant George G. Greenburg alone appeals.

GENTZEL & CRANE, for appellant Greenburg.

GIDEON S. THOMPSON, for appellees.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 998*—*when record fails to show error in the admission of evidence.* A written contract is not shown to have been erroneously admitted in evidence for the reason it was superseded by and merged in a subsequently-executed contract.

2. EVIDENCE, § 320*—*parol evidence.* Proof of matters antecedent to the making of a written contract, *held* not improperly admitted where the proof related to the circumstances under which a lease, referred to in the contract, was made, and did not refer in any way to the contract.

3. CONTRACTS, § 366*—*right to recover on one contract where two contracts declared on.* The fact that plaintiff in his affidavit of claim relies on two different contracts with the defendants, one as an original undertaking and the other as a guaranty, *held* not to prevent a recovery on the original undertaking when the same and its breach is established by the evidence, and the evidence of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

contract of guaranty is excluded from the record at the instance of defendant.

4. INDEMNITY, § 5*—*binding effect of temporary agreement.* A contract to protect a party from liability on a lease, to be binding "until otherwise contracted for by the parties," *held* intended to be in a sense a temporary arrangement, but to continue in force until the expiration of the lease unless sooner abrogated by another contract.

5. INDEMNITY, § 11*—*when contract covers attorney's fees.* A contract to indemnify a party against any damages sustained on account of its liability as the lessee in a lease, *held* to cover attorney's fees and costs where a judgment against such party was entered by confession on a power of attorney contained in the lease, with a provision therein for attorney's fees.

John J. Shea, Appellee, v. Paul J. Morand, Appellant.

Gen. No. 19,379. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed with finding of facts. Opinion filed December 31, 1914.

Statement of the Case.

Action by John J. Shea against Paul J. Morand for malicious prosecution. To reverse a judgment in favor of plaintiff for five hundred dollars, defendant appeals.

Defendant had procured the arrest of plaintiff on a charge of embezzlement, and on a hearing before a justice of the peace plaintiff was discharged.

The charge of embezzlement was based on the claim that plaintiff, while an agent of defendant, had collected money belonging to defendant and had appropriated it to his use. The undisputed facts were that before the complaint was made on which the warrant for the arrest of plaintiff was issued, defendant went to his

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shea v. Morand, 191 Ill. App. 11.

regular attorney, who for years had transacted for him such business as required the services of an attorney, and fairly and fully submitted to him all the facts within his knowledge concerning the charge that was eventually lodged against plaintiff. On the following day the attorney went to the office of defendant and examined the books of defendant pertaining to the matter and talked with the bookkeeper and the cashier and again talked with defendant, going over the facts with each separately. The attorney then advised that a demand be made on plaintiff for the money, which was done, with the result that plaintiff refused to turn it over. The attorney then advised defendant that plaintiff was guilty of the crime of embezzlement and advised him to "swear out a warrant." Acting on this advice, the complaint on which the warrant in question was issued was made.

THOMAS E. ROONEY and FERDINAND GOSS, for appellant.

No appearance for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. MALICIOUS PROSECUTION, § 75*—*when evidence shows defendant did not act without probable cause.* In an action for malicious prosecution, the course pursued by defendant in having plaintiff arrested for embezzlement, as shown by the uncontradicted evidence, held to successfully rebut any presumption of malice, and to conclusively establish the fact that defendant did not act without probable cause.

2. MALICIOUS PROSECUTION, § 13*—*when person acting on advice of counsel not liable.* Where a prosecuting witness presents all the facts within his knowledge, or that he could have ascertained by reasonable diligence, fairly and without reserve to a State's Attorney or some other lawyer of recognized ability and good standing, and in good faith acts on his advice, he cannot be held responsible in an action for malicious prosecution.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Western Coal & Mining Company, Defendant in Error,
v. Western Coal & Supply Company, Plaintiff in
Error.**

Gen. No. 19,418. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed December 31, 1914. Rehearing denied January 13, 1915.

Statement of the Case.

Action by the Western Coal & Mining Company, a corporation, against the Northern Coal & Supply Company, a corporation, to recover \$132.90 alleged to be due upon an open account for coal sold and delivered to defendant. Defendant filed a set-off claiming damages to the amount of \$504 for an alleged breach of the contract under which the coal was furnished. Upon a trial by the court without a jury, plaintiff had judgment, to reverse which, defendant prosecutes a writ of error.

Both the parties were engaged in the business of mining and selling coal. The plaintiff's office was at St. Louis, and the defendant's at Chicago. On January 9, 1912, the defendant gave a written order to the plaintiff for twenty-five cars of washed coal at the price of forty cents per net ton f. o. b. at the mines, to be shipped at the rate of three cars a day. The plaintiff accepted the order with the qualification that it would ship only one car a day. To this qualification the defendant agreed, in a letter dated January 13, 1912, in which defendant urged greater speed if possible and indicated that it expected deliveries to begin at once. No deliveries were made, however, until February, and only eleven cars in all were delivered. Between the date of the order and March 13, 1912, a number of letters were written by defendant to the plaintiff

Western C. & M. Co. v. Western C. & S. Co., 191 Ill. App. 13.

complaining of the delay and urging its need of more coal, to which the plaintiff replied by claiming that cold weather and a scarcity of cars had prevented it from shipping any faster. On March 13, 1912, defendant telegraphed: "Have sold coal and must deliver. Are you going to fill order?" To this, the plaintiff replied by mail that it would not be able to make any further shipments, for the reason that its "entire output will go out from the present time on, as mine run for railroad use." In this letter the plaintiff also expressed the hope that the defendant was "protected on the sale of this coal by delays in transportation, scarcity of cars, and other causes over which you have no control, which is the occasion for our failure to complete this order as placed." On March 25, 1912, defendant wrote to the plaintiff, stating that it had sold the "14 cars due us on this order" at an advanced price of \$648, that "our customers were compelled to go on the market and buy coal and we will suffer heavy damages, and we will be compelled to pass the same along to you," adding further: "We regret, therefore, to be compelled to advise you that we will hold your account to reimburse us against any loss for non-fulfillment of this order." At the time this letter was written nothing had been paid for the coal that was delivered, nor had any demand been made upon the defendant for such payment.

VROMAN, MUNRO & VROMAN and SIDNEY N. WARE,
for plaintiff in error.

WHITNEL & BROWNING and POMEROY & MARTIN, for
defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion
of the court.

Shirk v. Birk Bros. Brewing Co., 191 Ill. App. 15.

Abstract of the Decision.

1. **SALES, § 175***—*when proof of general custom as to time for payment competent.* In an action for the value of coal sold, where the defendant filed a claim of set-off for an alleged breach of the contract, evidence offered by defendant to show there was a general custom among coal dealers to pay for their coal during the month following the shipment, *held* competent to show that defendant was not in default at the time of plaintiff's breach of the contract.

2. **SALES, § 320***—*right to set-off or recoup damages in suit for price.* The fact that a buyer of coal had not paid therefor does not preclude him in a suit for the price from setting off or recouping damages suffered by him on account of the breach of the contract in not furnishing the stipulated quantity of coal where he was not in default in making payment, for the reason the parties acted upon the understanding that the price was not to be paid until all the coal was delivered.

E. W. Shirk, Plaintiff in Error, v. Birk Brothers Brewing Company, Defendant in Error.

Gen. No. 19,458. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 31, 1914. Rehearing denied January 13, 1915.

Statement of the Case.

Action of fourth class in the Municipal Court by E. W. Shirk against Birk Brothers Brewing Company, a corporation, to recover \$357.50, alleged to be due to plaintiff by the terms of a written lease for May rent for the year 1912, of certain premises in Chicago. Upon a trial by the court without a jury, judgment was entered in favor of plaintiff for \$27.50. To re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shirk v. Birk Bros. Brewing Co., 191 Ill. App. 15.

verse the judgment, plaintiff prosecutes a writ of error.

The plaintiff's statement of claim avers that on March 28, 1912, the plaintiff "executed and delivered" to defendant, a *written lease* of the premises in question, for a term beginning May 1, 1912, and ending April 30, 1913, at a rental of \$357.50 per month, payable in advance; that defendant "accepted the said lease" and took possession of the premises "thereunder," but did not pay the rent for May, 1912, when it became due under the terms of the lease.

The defendant's amended affidavit of merits states that defendant has a good defense, upon the merits, to all except \$27.50 of the plaintiff's demand. It denies, however, that defendant either "accepted the lease mentioned in the statement of claim," or went into possession under it, and then avers, in substance, that prior to April 30, 1912, the defendant was in possession of the premises under a lease providing for a monthly rental of \$330; that a fire occurred there in January, 1912, that soon after, a *verbal agreement* was made, to the effect that "in consideration of the defendant's renting the said premises at an increased monthly rental, to-wit, \$357.50, the defendant would be allowed the sum of \$330 by the plaintiff to compensate the defendant for the damages suffered through the aforesaid fire;" that "defendant has tendered \$27.50, being the difference between the monthly rental due on the first day of May, 1912, and the said \$330;" and that said tender was refused by the plaintiff.

ULLMANN, HOAG & DAVIDSON, for plaintiff in error.

LACKNER, BUTZ, VON AMMON & JOHNSTON, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 6*—*when evidence shows refusal of tenant to accept written lease.* Evidence held to show that a tenant did not accept a written lease, although he signed one of the duplicates, where he afterwards scratched out his signature and sent it to the landlord stating that he refused to be bound thereby for the reason it did not include a certain oral agreement, and this although the evidence showed that he did not return the other duplicate, which was not signed by him.

2. LANDLORD AND TENANT, § 330*—*form of judgment when proof fails to establish lease sued on.* In an action based solely on a written lease, where the defendant denied his acceptance thereof and set up a different contract under which he conceded he owed plaintiff a certain sum, held that on failure of plaintiff to prove the lease sued on, and his failure to amend his statement of claim, the court could enter only a judgment of dismissal or for the defendant for costs, and that it was error to enter a judgment in favor of plaintiff for the amount conceded by defendant to be due upon the other contract.

3. SET-OFF AND RECOUPMENT, § 18*—*claims of recoupment.* A claim of recoupment must arise out of the contract upon which the suit is brought, or be connected in some manner directly therewith.

4. SET-OFF AND RECOUPMENT, § 37*—*necessity of proving contract out of which claim for recoupment arises.* Where a plaintiff fails to prove the contract sued on, the defendant cannot prove another and different contract and then recoup damages for its breach.

**The Frederickson Company, Defendant in Error, v.
S. A. Lewinsohn, Plaintiff in Error.**

Gen. No. 19,754. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action in the Municipal Court of Chicago by The Frederickson Company, a corporation, against S. A.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Frederickson Co. v. Lewinsohn, 191 Ill. App. 17.

Lewinsohn to recover the price of goods sold and delivered. The plaintiff's statement of claim is "for goods, wares and merchandise bargained, sold and delivered by the plaintiff to defendant at the special instance and request of defendant," which merchandise consisted of 1,000 "daily pad" calendars delivered to defendant at different times between December 9, 1912, and December 30, 1912. The affidavit attached to the statement of claim states that this is a suit "upon contract for the payment of money; that the nature of the plaintiff's demand is for goods, wares and merchandise sold and delivered as above set out in the amended statement of claim," and that there is due to the plaintiff three hundred dollars, etc.

To this statement of claim, plaintiff in error filed an affidavit of merits, stating that he had a good defense upon the merits of the whole of the plaintiff's demand; "that said goods, wares and merchandise were not the goods, wares and merchandise which were sold to the defendant, in that (1) they did not contain the reading matter which the plaintiff agreed should be placed upon the same," viz., the words "corner of Dearborn street;" (2) the calendars "were to be securely fastened to a double mat," and were not, in fact so fastened; (3) the calendars "were to be numbered consecutively according to the day of the month and year," and were not so numbered; (4) "said goods and merchandise should have been delivered on the first day of December, 1912, but the same were not so delivered;" and that the alleged defective condition of the calendars was not discovered, and defendant was unable to discover the same, until the calendars had been in use for several months, and the "wear and tear incident to the use which they were put to revealed that condition."

On motion, this affidavit of merits was stricken from the files and judgment was entered, as by default, for want of a sufficient affidavit of merits. To reverse the judgment, defendant prosecutes a writ of error.

Defendant urged as ground for reversal that the affidavit of merits stated a good defense to plaintiff's claim and that the court erred in striking it from the files and entering judgment.

LESLIE H. WHIPP, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 323*—*when affidavit of merits does not state valid defense.* In an action to recover the price of pad calendars sold and delivered, an affidavit of merits alleging that the calendars were in defective condition and not the same as ordered, and in effect admitted that defendant received and used the calendars and did not return or offer to return them at any time, *held* not to state a valid defense, where it did not allege that there was any express warranty of the quality or condition, that plaintiff was a manufacturer of the calendars or that they were made to order.

2. SALES, § 323*—*when affidavit of merits does not state valid defense.* In an action for the purchase price of goods sold and delivered, an affidavit of merits setting up as a defense that the goods were not delivered at the time agreed upon, *held* not to state a valid defense, where there was no averment that defendant was damaged thereby, and the averment was apparently inserted in the affidavit only as one of the alleged facts supporting the theory that the goods delivered "were not the goods sold."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Hendrickson, 191 Ill. App. 20.

The People of the State of Illinois, Defendant in Error, v. Arnt Hendrickson, Plaintiff in Error.

Gen. No. 19,781. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Prosecution by the People of the State of Illinois against Arnt Hendrickson for wife abandonment. The defendant was found guilty and ordered to pay his wife nine dollars per week for one year for her support. To reverse the order defendant prosecutes a writ of error.

CHARLES J. TRAINOR, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

HUSBAND AND WIFE, § 274*—*when evidence shows husband guilty of wife abandonment.* A finding of guilty in a prosecution for wife abandonment held sustained by the evidence, where it appeared that defendant wilfully deserted his wife on a certain date without any intention of resuming cohabitation, that upon request he failed to provide for the family, and that the wife did not consent to the separation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William T. Huguley et al., Appellants, v. Henry Hamburg et al., Appellees.**Gen. No. 19,963.**

1. CORPORATIONS, § 727*—*when court will take jurisdiction of bill concerning affairs of foreign corporations.* The rule that courts of equity will decline to take jurisdiction of a controversy relating to the affairs of a foreign corporation, where the wrongs complained of are merely against the sovereignty by which the corporation was created or the laws of its existence, or are such as to require for their redress the exercise of the visitatorial powers of the sovereign, or where full jurisdiction of the corporation or of its stockholders is necessary to such redress and is wanting, does not apply when a bill is filed on behalf of a foreign corporation, by minority stockholders, to set aside an alleged fraudulent conveyance made by such corporation's agents to another corporation over which the court has acquired jurisdiction by its voluntary appearance.

2. CORPORATIONS, § 727*—*when jurisdiction of bill not defeated for want of jurisdiction of parties.* On a bill filed in behalf of a foreign corporation by the minority stockholders to set aside an alleged fraudulent conveyance made by the corporation's agents to another corporation, the fact that one of the agents had not entered a general appearance, or was not served with process, will not defeat the jurisdiction of the court where it does not appear its jurisdiction over the person of such agent is indispensable or even necessary in order to grant the relief.

3. EQUIT, § 211*—*grounds for general demurrer.* The mere fact that a bill prays for more kinds of relief than may be properly granted is no ground for sustaining a general demurrer to the bill and dismissing it for want of equity.

4. EQUIT, § 211*—*when bill not obnoxious on general demurrer.* Where a bill in equity sets out various claims to the interposition of the court and a general demurrer is filed, the demurrer will be overruled if any of the claims afford a proper case for the jurisdiction of the court.

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 31, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Huguley v. Hamburg, 191 Ill. App. 21.

LEWIS, FOLSOM & STREETER and J. G. GROSSBERG, for appellants.

WINSTON, PAYNE, STRAWN & SHAW, for appellees;
WALTER H. JACOBS and CHARLES J. McFADDEN, of counsel.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

To an amended bill of complaint filed by appellants in the Superior Court, the court sustained a general demurrer, and the complainants electing to stand by their bill, as amended, it was dismissed for want of equity. This appeal followed.

The amended bill states that the Princeton Copper Mining and Smelting Company, hereinafter referred to as the Princeton Company, is a corporation organized under the laws of the State of South Dakota, with an authorized capital stock of \$2,500,000, represented by 2,500,000 shares of the par value of \$1 each, of which about 2,000,000 shares have been actually issued; that the complainants own, in the aggregate, 328,950 shares of such stock, and that the defendants, Henry Hamburg and L. Devere Hamburg, own about 1,200,000 shares; that the Princeton Company was organized for the purpose of engaging in the business of mining and smelting, and prior to the year 1910, had its principal office and place of business in the village of Hamburg, Cochise county, Arizona; that the two Hamburgs reside at that place, and that by reason of their large holdings of stock in the company, they have, for a number of years, completely controlled the affairs thereof; that Henry Hamburg is the president and general manager of the company and L. Devere Hamburg is the secretary and treasurer; that none of the complainants resides in Arizona, and that few, if any, of the stockholders, other than the two Hamburgs, reside in Arizona; that the complainants became stockholders in the year 1905; that ever since that time, the two Ham-

burgs have had charge and possession of all the assets and property of the Princeton Company, and have used and appropriated to their own use "large amounts of money or property, the precise amount of which is unknown to complainants, which, in the aggregate, amounts to many thousands of dollars;" that the property of said company, in addition to land, consists of improvements, machinery, fixtures and personal property, which cost the company over \$100,000; that in 1910, said Hamburgs, for the purpose of defrauding the complainants and other stockholders of the company, organized a corporation under the laws of Arizona, called the "Hartford-Arizona Copper Mining & Smelting Company," to which they transferred, without any consideration whatever, and against the protest of the complainants, all the property and assets of the Princeton Company, "the pretended consideration at the time being, as your orators are informed, an exchange of stock of the Princeton Company for the stock in the said Hartford-Arizona Company, and among such stockholders as they, the said Henry Hamburg and L. Devere Hamburg, chose to favor, your orators not being of that number;" that after such transfer, the two Hamburgs caused themselves to be elected to the same official positions, respectively, in the new company, that they had occupied with the Princeton Company, and "continued in substantial exclusive charge and management" of the Hartford-Arizona Company, with offices in the same place as before, and conducted the affairs and business of the Hartford-Arizona Company in the same manner as before, except the change of the corporate name, and except that the complainants, and other stockholders whom said Hamburgs wished to exclude were not on the purported list of stockholders of the new company; that said Hamburgs have failed and refused to account to the Princeton Company for the disposition of its property; that said Hamburgs selected and controlled the board of directors of both companies and both said boards

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have neglected and refused to institute any proceedings against said Hamburgs to compel them to account, and that it would be useless to demand of either of said boards that they should institute such proceedings. The bill states that it is filed by the complainants in their own behalf and in behalf of all other stockholders of the Princeton Company who are similarly situated, and prays that an account may be taken under the direction of the court; that the Hartford-Arizona Company "may be decreed to restore and return" to the Princeton Company all the property so transferred and to give an account of the income and profit derived therefrom; that a receiver may be appointed for both companies, and for such other and further relief as equity may require.

The bill as amended also contains other allegations of fraud on the part of said Hamburgs in selling stock of the Hartford-Arizona Company, but, in the view we take of this case, it is unnecessary to consider such allegations in order to determine whether the court erred in sustaining the general demurrer and dismissing the bill for want of equity.

The decision of the chancellor seems to have been based upon the contention of appellees, which is repeated and relied upon in this court, viz., that "courts of equity will decline to take jurisdiction of a controversy relating to the affairs of a foreign corporation where the wrongs complained of are merely against the sovereignty by which the corporation was created or the law of its existence, or are such as to require for their redress the exercise of visitatorial powers of the sovereign, or where full jurisdiction of the corporation and of its stockholders is necessary to such redress and is wanting." This contention is a quotation taken almost *verbatim*, from the opinion of the Supreme Court in the case of *Babcock v. Farwell*, 245 Ill. 14. The sentence thus quoted is found on page 34 of the volume in which the opinion is published, but it

is by no means the whole of the court's opinion in that case, nor does it, when removed from its context, and standing alone, fairly express the substance of the rule laid down in that case. Further on in the same opinion the court states the remainder of the rule, and this remainder is more in point in this case than the sentence relied on by appellants. On page 36, it was said: "Where, however, the relief sought is within the general jurisdiction of a court of chancery, where all the parties necessary to the full and proper adjustment of the rights involved are before the court and where the relief sought does not require the exercise of the visitatorial power of the government, we think the court should exercise the power of determining controversies brought before it instead of remitting suitors to a foreign jurisdiction. * * * In many cases, under various circumstances, the courts have entertained jurisdiction of a suit brought against a foreign corporation and its directors or agents to compel the restoration of property misappropriated by such officers. In such case, though the act complained of is, in part, that of the corporation itself, and though the complainant is affected only in his capacity as a stockholder, the suit is, in effect, for the benefit of the corporation itself. The corporation, under such circumstances, may maintain a suit against its defaulting directors wherever they may be found, and there is no good reason why a stockholder who seeks to enforce precisely the same rights in favor of the corporation may not maintain a similar suit. * * * Where minority stockholders seek to have restored to the corporation property fraudulently appropriated to their own use by directors who, together with the corporation itself, are personally subject to the jurisdiction of the court, we think it is the better doctrine that the court should exercise its jurisdiction for the determination of the controversy." The doctrine thus declared was applied in two later cases reported in the same

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volume, viz.: *Edwards v. Schillinger*, 245 Ill. 231, and *Voorhees v. Mason*, 245 Ill. 256.

We think these cases are decisive of the questions involved in this case. Here a part, at least, of the relief sought, viz., the restoration to the Princeton Company of property alleged to have been misappropriated by its officers and agents, as well as the accounting prayed for, is clearly within the general jurisdiction of a court of chancery. Such relief does not require the exercise of the visitorial power of the government, but merely the exercise of the corrective powers of a court of equity. Henry Hamburg, the president and general manager of the Princeton Company, the Princeton Company itself and the Hartford-Arizona Company, all entered their general appearance in this case and the demurrer was filed by them jointly and severally. These defendants thereby became personally subject to the jurisdiction of the Superior Court in this case. The appearance of the other Hamburg does not seem to have been entered, nor was there any service of process upon him. But it does not appear from any allegation in the bill of complaint that jurisdiction over the person of L. Devere Hamburg is indispensable, or even necessary, in order to compel the Hartford-Arizona Company and Henry Hamburg to "restore and return," or to account for, the property alleged to have been fraudulently appropriated by them and now alleged to be in their possession and control. While the bill contains unnecessary allegations and prays for more kinds of relief than it might be feasible or proper to grant, yet, in its essential features, it is a bill brought on behalf of the Princeton Company, by minority stockholders, to set aside an alleged fraudulent conveyance made by that company's agents to another corporation over which the court has acquired jurisdiction by its voluntary appearance. This relief, at least, is clearly within the jurisdiction of the Superior Court. The mere fact

that other relief is also prayed for is no ground for sustaining a general demurrer to the bill, and dismissing the bill for want of equity. The rule in that respect is that where a bill in equity sets out various claims to the interposition of the court and a general demurrer is filed, the demurrer will be overruled if any of the claims affords a proper case for the jurisdiction of the court. *Snow v. Counselman*, 136 Ill. 191; *Gooch v. Green*, 102 Ill. 507.

For the reasons stated, the decree of the Superior Court will be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

William T. Huguley, Appellant, v. Henry Hamburg et al., Appellees.

Gen. No. 19,962. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 31, 1914.

Statement of the Case.

The bill filed in this case recites the same facts, in substance, as those set up in the bill filed in the case of *Huguley v. Hamburg*, reported on p. 21, *ante*, and the legal questions involved are substantially the same. The only difference between the cases is that the bill in this case sets up the facts in more detail and also avers sundry additional facts for the purpose of showing that the officers of the Princeton Company refused to allow certain transfers of appellant's stock to be made upon the books of the company, as re-

Harle v. Hamburg, 191 Ill. App. 28.

quested by the complaining stockholders, and prays for more extended relief. A general demurrer was filed to the bill on the sole ground of want of equity on its face, which demurrer was sustained, and therefore the decision in the case above mentioned held controlling.

LEWIS, FOLSOM & STREETER and J. G. GROSSBERG, for appellant.

WINSTON, PAYNE, STRAWN & SHAW, for appellees; WALTER H. JACOBS and CHARLES J. MCFADDEN, of counsel.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 422*—*when bill cannot be complained of as multifarious*. A bill cannot be complained of on review as multifarious, where such question was not raised either in the trial court or the reviewing court.

Julia C. Harle, Appellant, v. Henry Hamburg et al.,
Appellees.

Gen. No. 19,964. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. MCKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 31, 1914.

Statement of the Case.

The bill filed in this case contained, in substance, the same allegations as in the case of *Huguley v. Ham-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

burg, reported on p. 21, *ante*. A general demurrer was sustained to the bill and the decision in that case held controlling.

LEWIS, FOLSOM & STREETER and J. G. GROSSBERG, for appellant.

WINSTON, PAYNE, STRAWN & SHAW, for appellees; WALTER H. JACOBS and CHARLES J. MCFADDEN, of counsel.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

**Illinois Life Insurance Company, Defendant in Error,
v. Edward T. Kennedy, Plaintiff in Error.**

Gen. No. 20,003. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by Illinois Life Insurance Company, a corporation, against Edward T. Kennedy on a judgment note given by defendant to plaintiff for the amount of the first premium on a life insurance policy. A judgment by confession had previously been entered against the defendant, and it was afterwards opened to allow defendant to make a defense. Upon a trial before the court the defense failed, and judgment by confession was permitted to stand. To reverse the judgment, defendant prosecutes a writ of error.

Illinois Life Ins. Co. v. Kennedy, 191 Ill. App. 29.

EARL J. WALKER, for plaintiff in error.

HENRY W. PRICE and HUGH T. MARTIN, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 156*—*when provision in application no defense in suit on note given for premium.* In an action on a promissory note given for the amount of the first premium on a life insurance policy, it cannot be claimed as a defense that there was no consideration for the note, for the reason there was a clause in the application for the policy that the insurance company should incur no liability "until the first premium had been actually paid to and accepted by the company, or its authorized agent," where the evidence showed that the company accepted the note in payment of the premium, and that plaintiff, when he accepted the policy, signed a receipt stating that the premium had been paid.

2. INSURANCE, § 328*—*provisions in application which may be waived.* A provision in an application which provides that the insurance company shall incur no liability "until the first premium has been paid to and accepted by the company, or its authorized agent," and until the policy has been actually delivered to and accepted by the insured, is for the benefit of the company alone and may be waived by it.

3. INSURANCE, § 156*—*what does not constitute defense in suit on note given for premium.* The mere fact that an insurance company accepts a promissory note instead of cash in payment of the first premium does not constitute such a violation of the Act of 1891 (J. & A. ¶ 6491), prohibiting unjust discrimination by life insurance companies between insureds of the same class, so that it may be availed of as a defense to a suit on the note, and this especially where there is no evidence that any discrimination was made in the instant case, even though the acceptance of the note in some cases and not in others could be held to be a discrimination.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

S. F. Says, Defendant in Error, v. John Yangas and E. F. Thompson, Plaintiffs in Error.**Gen. No. 20,053. (Not to be reported in full.)**

ERROR to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914. Rehearing denied January 13, 1915.

Statement of the Case.

Action by S. F. Says against John Yangas and E. F. Thompson on a stay-of-execution bond given to plaintiff by Thompson with Yangas as surety, to recover the amount of a judgment, cost and interest, and the value of the use of the premises for the period during which Thompson remained in possession after the judgment was rendered, said judgment having been recovered by plaintiff against defendant in a suit for the possession of certain premises, and affirmed by the Appellate Court. See *Says v. Thompson*, 172 Ill. App. 207. The defendants filed an affidavit of merits. The court entered an order stating, in substance, that the defendants by their affidavit had admitted the amount of the original judgment, costs and interest to be due and that the affidavit showed a defense to only a portion of plaintiff's demand. A judgment was thereupon entered against the defendants for the amount of the original judgment, interest and costs, but reserved "for future determination and adjudication the matter of the balance of the plaintiff's demand." The defendants sued out a writ of error from that judgment, but were again unsuccessful and the judgment was affirmed. See *Says v. Yangas*, 187 Ill. App. 23. The defense interposed to the reserved claim for the value, use and occupation of the premises was that the premises had no rental value whatever because of the alleged untenable condition of the

SAYRE v. YARGAS et al., 191 Ill. App. 81.

same. A trial was had by a jury and plaintiff recovered a verdict and judgment for two hundred dollars. To reverse the judgment, defendants prosecute error.

THOMPSON, CLARK & STEVENSON, for plaintiffs in error.

M. B. WALTZ and HENRY T. CHACE, JR., for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1012***—*when remarks of court not presented for review.* Alleged prejudicial remarks of the trial court are not presented for review when not shown in the abstract of the record.

2. **LANDLORD AND TENANT, § 206***—*when instruction on duty of owner to make repairs proper.* An instruction to the effect that an owner of property is under no obligation to keep his premises in repair when the person who is in possession is occupying the same, without any agreement and without permission of the owner, *held* to correctly state the law applicable to the case.

3. **APPEAL AND ERROR, § 1884***—*admissibility of evidence in suit on stay bond.* In an action on a stay-of-execution bond to recover the amount of the judgment, costs and interest and the value of the use of the premises after the judgment was rendered, refusal to permit the defendant to prove an alleged agreement on the part of the plaintiff to make repairs, *held* proper where the offer related to a period of time prior to the original judgment.

4. **APPEAL AND ERROR, § 1884***—*admissibility of evidence in suit on stay bond.* In a suit on a stay-of-execution bond to recover for the use and occupation of the premises since the rendition of the judgment, it is not error to refuse to permit defendant to prove that he paid for repairs made on the premises where there was no proof tending to show that the plaintiff agreed to reimburse him for the same.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Margaret Hood, Plaintiff in Error.

Gen. No. 20,068. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. FRY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 31, 1914.

Statement of the Case.

Prosecution in the Municipal Court by the People of the State of Illinois against Margaret Hood for a violation of section 10 of the Motor Vehicle Act (J. & A. ¶ 10,010). Upon a jury trial the defendant was found guilty and fined fifty dollars and costs. To reverse the judgment, defendant prosecutes a writ of error.

The information alleged that plaintiff in error "heretofore, to-wit: On the 25th day of September, A. D. 1913, at the City of Chicago, aforesaid, did then and there, upon a public highway situated within the corporate limits of the City aforesaid, drive a motor vehicle at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, so as to endanger the life or limb or injure the property of any person. Informant further says that the above violation then and there occurred upon a public highway within the jurisdiction of the South Park Commissioners in violation of section 10, Illinois Motor Vehicle Law."

A motion to quash the information was made and overruled.

EDWARD H. MORRIS, for plaintiff in error.

MACLAY HOYNE, for defendant in error; **E. E. WILSON** and **JAMES C. DOOLEY**, of counsel.

The People v. Hood, 191 Ill. App. 33.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 1*—*when information sufficient to charge violation of statute as to speed.* An information charging a violation of section 10 of the Motor Vehicle Act (J. & A. ¶ 10,010) held not defective for the reason it charges the offense disjunctively, in that it alleges not only that defendant drove a motor vehicle "at a speed greater than is reasonable and proper having regard to the traffic and the use of the way," but also "so as to endanger the life or limb or injure the property of any person;" the violation of the statute is charged by the first clause, and the second clause may be regarded as surplusage.

2. AUTOMOBILES AND GARAGES, § 1*—*when allegation in information need not be proved.* In an information charging a violation of section 10 of the Motor Vehicle Act (J. & A. ¶ 10,010), an allegation that the violation occurred upon a public highway within the jurisdiction of the South Park Commissioners is immaterial and need not be proved, where there was another allegation in the information that the violation occurred upon a public highway in the city of Chicago, and that fact was proved.

3. AUTOMOBILES AND GARAGES, § 1*—*necessity of proof showing violation of statute within limitation period.* A conviction for a violation of section 10 of the Motor Vehicle Act (J. & A. ¶ 10,010) cannot be sustained where the proof does not show that the offense was committed within eighteen months before the commencement of the prosecution as required by the Criminal Code, div. IV, sec. 4 (J. & A. ¶ 4011), and this although the information is sufficient on its face to charge the commission of the offense within such time, since the information is not evidence and cannot supply the lack of proof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thomas A. Barron, Plaintiff in Error, v. Isidor Levinson, Defendant in Error.**Gen. No. 18,567. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. EDWIN K. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 31, 1914.

Statement of the Case.

Action by Thomas A. Barron against Isidor Levinson to recover damages for injuries to plaintiff's flat alleged to have been caused by defendant as a tenant. It appeared that in April, 1910, the defendant rented a flat from the plaintiff and occupied it from that time until May 30, 1911, under a verbal lease from month to month. On May 1, 1911, plaintiff served on the defendant a thirty days' notice to quit. Defendant moved out on May 30, 1911, but retained the keys of the flat. The next day the plaintiff called on the defendant and asked him for the keys. Defendant refused to give them up but sent them by mail the next day. Plaintiff thus received the keys on June 2, 1911. According to the plaintiff's evidence, in which he is corroborated by three other witnesses, he found, when he entered the vacant flat on June 2nd, that some of the glass globes of the chandeliers were broken and scattered around the floor and others were missing; that several of the window shades were torn, and a large piece torn out of one of them had been thrown on the front porch; that one of the inner doors had been cut in several places as by an axe; that part of the grillwork between the first and second rooms was broken and one of the posts had apparently been chopped by an axe; that most of the window cords had been cut and some were hanging loose; that the woodwork was scratched, dented and splintered; and upon

Barron v. Levinson, 191 Ill. App. 85.

the papered walls of the parlor and bedrooms had been written in colored chalk and with indelible pencils the words "Beware of Rats," and "Beware of Bed-Bugs." The undisputed evidence was that the flat was in good condition when the tenant moved in, and that the plaintiff was required to expend a considerable sum of money to repair the damage thus found after the tenant had moved. There was also evidence that a bitter feeling existed between the landlord and tenant. As opposed to this evidence, defendant testified that when he left the flat there "was no damage except such as might be termed 'ordinary wear and tear,'" and he produced two witnesses who testified that they were present when he moved out, and "saw no damage."

A trial was had by the court without a jury and the court found the issues for the defendant, upon the ground, as stated in the statement of facts certified to this court, "that the evidence failed to show that the defendant did or committed the acts complained of, or that the same were permitted to be done to the knowledge of the defendant." To reverse the judgment, plaintiff prosecutes a writ of error.

ROST & SMITH, for plaintiff in error.

GORMAN, POLLOCK, SULLIVAN & LIVINGSTON, for defendant in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 197*—*when finding as to injury to premises by tenant contrary to evidence.* In an action by a landlord to recover damages to his flat alleged to have been caused by the defendant as his tenant, a finding in favor of defendant held contrary to the weight of the evidence, where a preponderance of the evidence showed that the damage was done after notice to quit had been served on defendant and before he turned over the keys

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Reddig v. Friedenwald, 191 Ill. App. 37.

to the flat, and it also appeared that he refused to turn over the keys on the next day after he moved out, but returned them by mail so that plaintiff did not receive them until two days thereafter, and it did not appear that defendant denied that he was at the premises in the interim between the time he moved out and the time plaintiff received the keys by mail, from which fact a reasonable inference would arise that the damage was deliberately committed either by the defendant himself or by some one for whose acts he was responsible.

2. EVIDENCE, § 40*—*when failure to deny material fact raises presumptive evidence would be unfavorable.* There is a well-established principle of law that where a fact material to the issue is within the knowledge of one of the parties to a lawsuit, the failure to disclose such fact, when the opportunity is offered, gives rise to the presumption that the evidence would have been unfavorable.

George W. Reddig et al., Copartners, trading as Reddig Company, Defendants in Error, v. Norman Friedenwald, Plaintiff in Error.

Gen. No. 19,493. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by George W. Reddig, R. R. Reddig and F. O. Reddig, copartners, trading as Reddig Company, against Norman Friedenwald to recover for work and materials furnished to the defendant. The trial was before the court without a jury. To reverse a judgment entered on a finding in favor of plaintiff for \$161.48, defendant prosecutes a writ of error.

SIDNEY N. WARE, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shope v. Laughlin, 191 Ill. App. 38.

BENNER & WELD, for defendants in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

PRINCIPAL AND AGENT, § 181*—*when finding that defendant acted in capacity of principal warranted by evidence.* In an action to recover for work and materials furnished where the only issue in the case was whether the defendant when ordering the material acted in the capacity of principal or agent, a finding in favor of plaintiff *held* warranted by the evidence, it appearing that there were but two witnesses, one for each of the parties, and that the trial court found against the contention of defendant.

Simeon P. Shope et al., Copartners, trading as Shope, Zane, Busby & Weber, Appellees, v. Henry D. Laughlin, Appellant.

Gen. No. 19,637. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. **CHARLES H. BOWLES**, Judge, presiding. Heard in the Branch Appellate Court at the April term, 1913. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by Simeon P. Shope, John M. Zane, Leonard A. Busby and Harry P. Weber, copartners, trading as Shope, Zane, Busby & Weber, against Henry D. Laughlin for services rendered to defendant by plaintiffs as attorneys and for money advanced, and also for services rendered and money advanced by a firm to whose business the plaintiffs succeeded. A trial was had before the court and a jury and a verdict was returned in favor of plaintiff for five thousand dollars. To reverse the judgment, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shope v. Laughlin, 191 Ill. App. 38.

LOOMIS C. JOHNSON and RANDOLPH LAUGHLIN, for appellant.

JOHN M. ZANE and HARRY P. WEBER, for appellees.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 135*—*when findings in suit for compensation sustained by the evidence.* In a suit by law firm for services rendered to defendant, where the defendant claimed that he was not personally liable for the reason that the services were rendered for corporations in which he was interested, that he was coerced into signing certain notes in payment because of his dependency upon plaintiff's firm in the various matters of litigation, and that certain payments made by him were misapplied, *held* that under the evidence in the record such questions were for the jury, and that the findings of the jury in favor of plaintiffs was sustained by the preponderance of the evidence.

2. ATTORNEY AND CLIENT, § 134*—*admissibility of assignment of claim for legal services.* In an action by the assignee of a claim for attorneys' fees, where one of the counts of the declaration set forth the assignment, and during the trial an additional count was filed, *held* that the assignment could properly be introduced in evidence under the original declaration and that it was unnecessary to file the additional count.

3. ATTORNEY AND CLIENT, § 134*—*admissibility of assignment of claim for legal services.* In an action by a law firm for services rendered, where a part of the claim was for services rendered by a firm to whose business the plaintiffs' firm succeeded, and such part of the claim was sued for by plaintiff as assignee, *held* that a copy of the assignment was properly admitted in evidence as against the contention of defendant that it was not admissible, for the reason that the assignment did not cover the accounts for services sued for which were rendered to corporations in which defendant was interested, and that no foundation was laid for the introduction of a copy of the last assignment.

4. TRIAL, § 271*—*when refusal to submit special interrogatories not improper.* Refusal of court to submit to the jury numerous special findings, *held* not error where the findings involved mere evidentiary facts and the giving of them would practically have subjected the jury to cross-examination as to the reasons for arriving at their conclusions.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Colonial Sugar Co. v. Railway T. & W. Co., 191 Ill. App. 40.

5. INSTRUCTIONS, § 143*—*when requested instructions properly refused.* The refusal of two certain requested instructions held proper, where one of them contained the words "under the other instructions of the court," and could be controlling only upon the facts when specially limited to the other instruction or if the two instructions were given as one instruction, and the other instruction if standing by itself would tender an immaterial issue.

6. INSTRUCTIONS, § 140*—*when requested instructions may be properly refused.* A requested instruction held not improperly refused, where it was cautionary in its nature and moreover bad in form and covered by another instruction given.

7. APPEAL AND ERROR, § 1541*—*when giving of instruction not prejudicial.* The fact that an instruction given on behalf of plaintiffs referred to facts not denied by defendant, held not prejudicial under the facts of the case on the ground that it directed the jury's attention to particular evidence.

8. INSTRUCTIONS, § 137*—*when properly refused.* A requested instruction may be properly refused where there is no evidence in the record upon which to base it.

9. ATTORNEY AND CLIENT, § 135*—*when finding as to amount of compensation sustained by the evidence.* The amount of a verdict for the services of a firm of attorneys, held not excessive because the defendant was not credited with a certain sum paid by a note, where it was a controverted question of fact whether or not a reduction had been made, and it was admitted by defendant that there was a conflict on that issue.

Colonial Sugar Company, Defendant in Error, v. Railway Terminal & Warehouse Company, Plaintiff in Error.

Gen. No. 19,862. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement of the Case.

Action brought in the Municipal Court of Chicago by the Colonial Sugar Company against the Railway Terminal & Warehouse Company a corporation, for damages to the contents of three cars of sugar stored by plaintiff in the warehouse owned and operated by defendant. At the time the suit was brought, James D. Pugh and Andrew McAnsh were also joined as defendants, but before the trial they were dismissed out of the case, and the cause proceeded against the Railway Terminal & Warehouse Company alone. Trial was had before the court without a jury. To reverse a judgment entered on a verdict for plaintiff for \$485.67, the Railway Terminal & Warehouse Company prosecutes error.

Defendant conducted a storage warehouse in the city of Chicago. Plaintiff shipped three cars loaded with bags of sugar, for storage, to the defendant, at its warehouse in Chicago. These cars were directed to F. C. Van Ness, care of the Railway Terminal & Warehouse Company, the defendant; and when delivered to the Warehouse Company, a warehouse receipt was issued to the said F. C. Van Ness. The contents of these cars were unloaded at the warehouse. The bags were stored in tiers seven or eight bags high, on the main floor of the warehouse, which is slightly above the street level, within twenty or twenty-five feet of doors that remained open practically the entire day. These doors led out directly onto a switch track, and beyond the switch track is a public roadway. There was evidence to prove that dust and dirt had collected on the bags and that the sugar was lumpy and of a dirty or grayish color.

Q. J. CHOTT and FRANK H. CULVER, for plaintiff in error.

Colonial Sugar Co. v. Railway T. & W. Co., 191 Ill. App. 40.

HOYNE, O'CONNOR & IRWIN, for defendant in error;
CARL J. APPELL, of counsel.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. WAREHOUSEMEN, § 13*—*when liable for damage to goods stored.* In an action against a warehouse company for damage to sugar while stored in defendant's warehouse, a verdict for plaintiff held sustained by the evidence, where it appeared that defendant permitted the sugar to be stored so as to be exposed to the weather and the dust from the street.

2. WAREHOUSEMEN, § 19*—*right to limit liability by provision in warehouse receipt.* The Act relating to Railroads and Warehouses, (Hurd's R. S. 1911, ch. 114, §§ 243b, 261, J. & A. ¶¶ 90002, 9020), held not to permit a warehouse company by a provision in a warehouse receipt to limit its liability for failure to exercise ordinary care for the property intrusted to it for safe-keeping.

3. WAREHOUSEMEN, § 19*—*limitation of liability in warehouse receipt construed.* A provision in a warehouse receipt that: "All damage to goods or property occasioned by fire, water, leakage, shrinkage, breakage, ratage, vermin, heat, frost, change of weather or from inherent qualities of the property, by riot or any accident or providential cause at owner's risk," held not to exempt the warehouse company from liability for negligence in permitting goods to be stored in the warehouse near an open door so as to be exposed to the weather and the dust of a street.

4. WAREHOUSEMEN, § 29*—*when plaintiff's right to sue cannot be urged on review.* Where a judgment was recovered against a warehouse company for damage to goods while in storage, held that defendant could not urge on review that the suit should have been brought by the person in whose name the warehouse receipts were issued, where the plaintiff sued as owner, and defendant's affidavit of merits did not deny plaintiff's ownership, and there was evidence that defendant recognized plaintiff as such owner.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Clarence E. Welch, Appellee, v. Chicago & Alton Railroad Company, Appellant.

Gen. No. 19,977. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by Clarence E. Welch against the Chicago & Alton Railroad Company, a corporation, to recover damages for personal injuries sustained by plaintiff while in defendant's employ as a brakeman. To reverse a judgment entered on a verdict in favor of plaintiff for ten thousand dollars, defendant appeals.

The facts showed that plaintiff was injured by stumbling over a pile of cinders on the railroad track when he went between moving cars to disconnect the air hose for the purpose of stopping the train in order to avoid a collision with other cars at certain depot grounds, while switching.

Plaintiff's declaration charged that the movement of the cars was an interstate commerce movement and therefore the Federal Employers' Liability Act applied.

The gravamen of the charge in the three counts remaining in the declaration when the case went to the jury was: That the defendant did not provide a reasonably safe place for the plaintiff to work, in that defendant negligently permitted "piles of cinders unnecessarily to be and remain upon its track known as its Peoria main, at Dwight, Illinois, and had negligently failed to use reasonable care to inspect, discover and remove them, thereby making the track not reasonably safe for the plaintiff to work on; that defendant could have discovered the cinders had it used reason-

Welch v. Chicago & Alton R. Co., 191 Ill. App. 48.

able care; that plaintiff could not have, and was ignorant of them; that while walking on the track between the cars, which obscured his view of them, he tripped, stumbled over them, and was injured."

Because of the application of the Federal Employers' Liability Act, the defense of fellow-servant was eliminated, and the defense of plaintiff's contributory negligence was urged only in mitigation of the damages.

The defense relied on at the time of the trial, as shown by the briefs and argument of counsel, was that the accident was the result of a danger of which the plaintiff had assumed the risk, and the defendant confines its brief and argument on this appeal to that issue, and contends that the pile of cinders was: (1) An incidental risk and hazard ordinarily connected with the plaintiff's employment; or (2) an extra hazard of which he had had actual notice; or (3) an extra hazard of which he will be presumed to have had notice because they were so patent and obvious; because they were at all times on the Peoria main; because he was by and on this track innumerable times when cinders were on it.

WINSTON, PAYNE, STRAWN & SHAW, for appellant;
SILAS H. STRAWN, EDWARD W. EVERETT and J. SIDNEY CONDIT, of counsel.

FRANCIS J. WOOLLEY, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 698*—*when recovery for injury to brakeman sustained by the evidence.* In an action for injuries sustained by a brakeman alleged to have been caused by the negligence of defendant in permitting a pile of cinders on the railroad track, where the defense was that plaintiff assumed the risk, a verdict

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for plaintiff *held* sustained by the evidence, where it was conceded that the pile of cinders caused the injury, and it appeared that plaintiff had no knowledge of the cinders or that he had worked on the line at the particular place in question for several months prior to the injury.

2. MASTER AND SERVANT, § 766*—*when refusal to direct verdict for defendant proper*. In an action against a railroad company for injuries sustained by plaintiff alleged to have been caused by a pile of cinders in the track, over which he stumbled when he went between moving cars to disconnect the air hose in order to stop the train for the purpose of avoiding a collision, refusal of court to direct a verdict for defendant on the ground that plaintiff was charged with notice of the pile of cinders and that he assumed the risk, *held* not error, where there was evidence tending to show that plaintiff had not worked at the particular place in question for many months and that he had no knowledge of the pile of cinders, and it also appearing that a rule of the company had been posted in the form of a bulletin at various places on the line forbidding the dumping of cinders on tracks at the place in question.

**Mary M. Springer, Plaintiff in Error, v. David Bradley
Manufacturing Company, Defendant in Error.**

Gen. No. 19,996.

1. CONTRACTS, § 51*—*when finding as to letters constituting sustained by the evidence*. A finding of the trial court on conflicting evidence that a letter alleged to have been written by defendant to plaintiff was mailed to and received by plaintiff and that plaintiff replied by letter and that the two letters constituted a binding contract, *held* sustained by the evidence.

2. APPEAL AND ERROR, § 1414*—*when findings of trial court will not be disturbed*. In a case tried without a jury, the findings of the trial court on conflicting testimony will not be disturbed by the Appellate Court, unless clearly and manifestly against the weight of the evidence.

3. ACCOUNT STATED, § 3*—*when account in defendant's books binding on plaintiff*. An account as shown in the books of defendant is binding on plaintiff where the plaintiff in a stipulation admitted that the books showed the indebtedness, and this though the stipulation

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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reserved to plaintiff the relevancy and admissibility of the account, where it further appeared that the account was made a part of a letter addressed to plaintiff by defendant and plaintiff in a letter written in reply acquiesced and agreed to the account as stated.

Error to the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

Statement by the Court. This is an action brought in the Municipal Court of Chicago by Mary Morgan Springer, plaintiff in error, hereinafter referred to as the plaintiff, against the David Bradley Manufacturing Company, a corporation, hereinafter referred to as the defendant, for the sum of \$3,397, which represents dividends which plaintiff claims were due her from defendant at the time this suit was brought, viz., April 5, 1912. Plaintiff's statement of claim and amendment thereto set forth that the plaintiff owned 316 shares of stock of the defendant; that from January 31, 1910, up to April 5, 1912, various dividends had been declared, the aggregate dividends totaling \$3,397. It was stipulated between the parties that all the foregoing dividends were declared, not from earnings of the said Company, but from money realized from the sale of assets disposed of in the liquidation of the defendant. To the plaintiff's statement of claim defendant filed a statement of defense and set-off, verified by J. Harley Bradley, president of the defendant. This statement of defense and set-off did not deny that plaintiff was the owner of the 316 shares of stock, and that as a result of the sale of assets of the defendant Company in liquidation, dividends accrued on plaintiff's 316 shares to the amount of \$3,397. Defendant, however, in the statement of defense and set-off, alleges the fact to be that the 316 shares of stock came into the possession of the plaintiff by reason of a distribution of the estate of Mary Ella Morgan, mother

of the plaintiff, who died on or about November 1, 1899; that this distribution was made by written agreement under date of July 25, 1900, to which plaintiff, her father and her five brothers and sisters were parties; that by this agreement all the personal and real property, with the exception of a certain piece of property known as 389 West Adams street, was divided equally among the signers of this agreement, and that these 316 shares of stock represented one-seventh of the number of shares of stock of the defendant owned by the mother, Mary E. Morgan, deceased; that at the time of the death of the said Mary E. Morgan, there was due from her to the defendant \$14,444.18, and that after her death, debts of her estate to the extent of \$4,357.19 were paid by the defendant, the entire indebtedness being in the sum of \$18,801.37; that in a letter written January 15, 1900, the plaintiff was one of five members of her immediate family to request the defendant to advance moneys to the family for household expenses, and agreed to pay her pro rata share of the advances so made, viz., one-fifth; that the advances were to be made in the name of Marion S. Morgan, trustee, a sister of the plaintiff; that acting under said letter, defendant advanced said Marion S. Morgan, trustee, the sum of \$9,962.22; that defendant had advanced to plaintiff for personal use, up to November 1, 1901, the sum of \$1,040; that on October 31st two dividends—one of six per cent. and one of one per cent—were declared on the stock of the defendant Company; that in a letter written by the defendant to the plaintiff on December 10, 1901, defendant directed the attention of the plaintiff to the fact that an agreement had been entered into by the plaintiff and her father and her five brothers and sisters, whereby each should have one-seventh of the estate of Mary Ella Morgan, deceased mother, and pay one-seventh of all claims against the same; the letter also directed the attention of the plaintiff to the fact that she was one of five that had agreed to pay their pro rata share of the

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moneys advanced to Marion S. Morgan, trustee, a sister of the plaintiff, for household expenses; further, that an account had been opened on the books of the defendant Company with each one individually, and in order that she might understand fully the amount of the indebtedness and the manner in which it was divided, he inclosed statements of the various accounts as they stood on the books of the Company; that said letter further stated that dividends earned by the stock up to that time had been credited to the account of the plaintiff, and that further dividends, when declared, would be credited to the account; that the account would bear interest at the rate of six per cent. payable quarterly, the same as the dividends; that to make everything plain, he inclosed another statement showing how her personal account stood on the books, which statement showed that there was an indebtedness from her due the Company of \$3,462.90, which included all cash advanced to her directly for her own personal use; the letter further provided for an advance of \$60 per month for plaintiff's schooling; that the letter also asked her, in acknowledging receipt of this letter, to state whether this manner of handling the estate account was perfectly satisfactory; that inclosed in said letter were the various statements of accounts mentioned therein; that plaintiff in a written reply to the said letter approved the account set forth in that letter, acquiesced therein, and stated it was as agreed upon; that said letter of December 10, 1901, and the aforesaid reply thereto, constituted a written contract by which the plaintiff undertook to pay one-seventh of the indebtedness due from Mary Ella Morgan, deceased, her estate, and the pro rata share of advances made to Marion S. Morgan, trustee, and the moneys advanced to her directly for her personal use, and interest on these accounts as mentioned in the letter of December 10, 1901.

The statement of defense and set-off further set forth the exact state of the account as defendant claims

between the plaintiff and the defendant at the beginning of this suit; that the total sum of the indebtedness, without allowing any credits, amounted to \$16,638.17; that this account was made up of the moneys due defendant by reason of the plaintiff's liability for one-seventh of the indebtedness due defendant for moneys advanced to the mother, Mary Ella Morgan, and her estate, for her pro rata share of the moneys advanced to Marion S. Morgan, trustee, for household expenses, viz., one-fifth thereof, the interest on said indebtedness, and the cash advances which at the time this suit was instituted amounted to \$7,671.19. The statement further shows that there was a credit against this of \$10,526.31, which consisted of dividends declared before liquidation of the defendant Company and subsequent thereto, and certain moneys due the plaintiff from J. Harley Bradley, trustee, with reference to certain property held by him on behalf of the plaintiff and the other heirs of the deceased mother's estate, which payments had been credited to the plaintiff's account; and that after allowing all just credits, there was due on the claim of defendant's set-off, \$6,111.86. To this claim of set-off plaintiff filed an affidavit of merits admitting that the estate had not been probated, and denying that the 316 shares of stock came into her hands by virtue of the agreement dated July 25, 1900, alleging that she took them by inheritance from her deceased mother. It, however, admitted the signing of the agreement of July 25th referred to as exhibit "A;" it further denied that plaintiff agreed to pay one-seventh of the alleged indebtedness of Mary Ella Morgan incurred during her lifetime, or of the estate after her death; denied having entered into any agreement to pay defendant one-fifth of the alleged advances to Marion S. Morgan, trustee, for household expenses; denied that she wrote a letter in reply to defendant's letter of December 10, 1901, (which is designated as exhibit "B"), and therefore did not expressly or by

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implication agree or consent to the terms of the said letter. In this affidavit of merits plaintiff sets up further, by way of defense, that the amount representing one-seventh of Mary Ella Morgan's indebtedness, viz., \$2,685.91, and the amount representing one-fifth of the indebtedness against Marion S. Morgan, trustee, viz., \$1,932.40, were promises to pay the debt of another, and not being evidenced by any note or memorandum in writing signed by the plaintiff, were within the statute of frauds, and therefore could not be enforced; that even if it could be held that the agreement was in writing, that so much of the advances as was made more than ten years prior to the beginning of this suit was barred by the statute of limitations; however, there being no agreement or memorandum in writing, that the entire claim was barred because the right of action did not accrue within five years next preceding the commencement of this action. However, in the plaintiff's brief, items to the amount of \$1,696.56 were admitted by the plaintiff as having accrued within the five years prior to the commencement of this suit, and it was conceded should have been allowed against the claim of the plaintiff. Upon the issues here presented, the cause was submitted to the court without a jury. The court found the issues against the plaintiff on defendant's plea of set-off, assessed the damages at \$5,693.81, and entered judgment on this finding, to reverse which judgment the plaintiff has sued out this writ of error.

WILLIAM SLACK, for plaintiff in error.

GARDNER, CARTON & THOMSON, for defendant in error;
JOHN M. ZANE, of counsel.

MR. JUSTICE PAM delivered the opinion of the court.

The court in its finding allowed the entire claim of the defendant against the plaintiff, save certain items in the nature of compound interest which had been in-

cluded in the indebtedness due the defendant from Mary Ella Morgan, the mother. Although many issues are presented by the various contentions of the parties to this litigation, the one issue determinative of the case is, whether or not a contract or agreement had been entered into between the plaintiff and the defendant by reason of the letter in evidence referred to as exhibit "B," claimed to have been written by the defendant to the plaintiff on December 10, 1901, and a letter in reply thereto, which defendant claims to have received from the plaintiff. The plaintiff denies ever having received the letter referred to as exhibit "B," and further denies not only that she wrote a reply, but, having failed to receive the letter, she could not have written a reply thereto. The relationship of the parties has an important bearing on the determination of this issue.

Mary Ella Morgan, deceased mother of the plaintiff, was the sister of J. Harley Bradley, president of the defendant Company. The evidence shows that an account was carried on the books of the defendant with her; that bills incurred by her were paid by the defendant Company; that it was customary for the Company to pay bills presented which bore the "O. K." of either Mrs. Morgan or her brother, J. Harley Bradley; and the payments as made were charged to her account. It was admitted by stipulation of the parties hereto that at the time of the trial the books of the defendant showed an indebtedness of Mary Ella Morgan to defendant of \$18,801.37. The evidence showed that of this amount \$14,444.18 was for debts incurred during decedent's lifetime, and \$4,357.19 for debts paid after her death.

On January 15, 1900, a short time thereafter, plaintiff, together with her father, her two sisters and a brother, wrote the following letter to J. Harley Bradley, who was then president of the defendant Company:

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"CHICAGO, Jan. 15, 1900.

MR. J. H. BRADLEY,
63 N. Des Plaines St., Chicago.

DEAR BROTHER:

Marion, Margia, David and Mary have thought over question of expenses, and consented to have the \$5,000 charged pro rata with me; \$1,000 each, with understanding that when a dividend be declared, on the stock, it will be credited back and not stand against the principal. Above is, I think, what you desire. So if you will send a check amounting to \$416.50 made out to Marion S. Morgan on the first of each month, beginning Feb. 1st, I think everything will be satisfactory.

(Signed) G. C. MORGAN,
MARION SHERMAN MORGAN,
MARGIA CYNTHIA MORGAN,
DAVID BRADLEY MORGAN and
MARY A. MORGAN," (plaintiff).

From this letter it is evident that the family wished to arrange for at least certain family expenses to be paid by the defendant, and that the dividends due on the shares of stock held in the mother's name be applied in payment of any indebtedness created by any advance made by the defendant in pursuance of this letter. At this time plaintiff lacked about six months of her majority.

The estate of Mary Ella Morgan was never probated, but on July 25, 1900, an agreement was entered into between the father and the sisters and brothers of the plaintiff and herself, which provided for the distribution of the estate. At this time plaintiff had already reached her majority. By this agreement all the personal and real property of the estate of Mary Ella Morgan was divided into seven equal parts, save that the father, G. C. Morgan, in addition to his one-seventh, was given the house known as 389 West Adams street, Chicago. At this time, under the stipulation previously referred to, the books of defendant

showed an indebtedness due from Mary Ella Morgan and her estate, of \$18,801.37.

On October 31, 1901, two dividends were declared, one of six per cent. and one of one per cent. Under the distribution agreement of July 25th, *supra*, plaintiff was entitled to 316 shares of capital stock. On this stock, under the dividend declared, plaintiff was entitled to a credit of \$2,212. J. Harley Bradley testified that on December 10, 1901, he wrote plaintiff the following letter:

“CHICAGO, December 10, 1901.

MISS MARY MORGAN,

Vassar College.

MY DEAR NIECE:

After thinking over your mother's estate and the manner in which it is now kept on our books, and discussing it with Geo. Jr., we have decided that the best thing to do, while all are well, and in position to understand and express their views, to divide the estate in accordance with the agreement entered into by all of you; viz.: that each one should have one-seventh of the estate and pay one-seventh of all claims against the same, and we have opened an account with each one individually, and in order that you may understand fully the amount of the indebtedness and manner in which it is divided, I give you herewith statement of the various accounts as they now stand on our books, viz.: Account of Mrs. M. E. Morgan; account estate Mrs. M. E. Morgan No. 1; account estate Mrs. M. E. Morgan No. 2; account Marion S. Morgan, trustee; the last account, Marion S. Morgan, trustee, you will readily understand, is the account in which five of you agreed to advance so much towards the running expenses of the house; the statement shows the division, and how it is arrived at. To make everything plain, I enclose another statement showing how your personal account stands on our books after paying the 6 per cent. dividend of July 1st and 1 per cent. quarterly dividend of October 1st, which leaves an indebtedness, as you will see by statement, of \$3,462.90. There will be 3 per cent. more dividend payable 1 per cent. quarterly, due

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July 1, 1902, which will be credited to your account, and you will be notified when the dividend is declared, and shown exactly how your account stands after the credit. The account will bear interest at 6 per cent., payable quarterly, the same as the dividend. You will understand that this is a dividend for this year only; no assurance of dividend next year, although we live in hopes of dividend each year. Understand these statements represent simply what has been drawn before your mother's death on her account, and after her death up to this time. There is also a \$10,000 note at the First National Bank which is also a part of the estate indebtedness, and which will have to be secured by a proportionate amount of stock from each individual heir. There is also a \$6,000 note which is secured by certain collateral, and guaranteed by myself to H. A. Gardner. This, I think, covers the whole history of the estate, and while the heirs are not liable for the \$6,000 note, excepting Mr. Morgan, Sr., I presume if there should be a bonanza in it, you would all be glad to be, for that reason I think it ought to be a part of the indebtedness of the estate, although your father may feel differently when I talk to him about it. I hope after January 1st to get these notes in shape. I believe a better rate (of interest) can be obtained after January 1st. The \$6,000 note will have to be secured by bonds of the Indianola Water Works, and which amount of stock proportionately divided that will make it perfectly good. Now, in acknowledging receipt of this, state whether this manner of handling the estate account is perfectly satisfactory. If it is, I will then have entries made on the books in accordance with statement rendered, and the stock will then be divided, and the company will simply hold double the amount of stock as security to the indebtedness. Believe this plan wise and better for all than to let matter stand as separate account. Still, I shall be governed entirely by the views of those most interested. Shall arrange so you get \$60 a month on your account for schooling.

(Signed) J. HARLEY BRADLEY.

P. S.—The amount of stock in your name is 316 shares."

J. Harley Bradley further testified that with said letter were inclosed the statements mentioned therein.

Notice was served upon the plaintiff to produce said letter. It was not forthcoming, plaintiff claiming never to have received it. Mr. Bradley testified that he dictated the letter to his stenographer, Mrs. Maude Smith, and that after Mrs. Smith had transcribed it from her notes, it was handed to him for signature; that he signed same and returned it with all the inclosures to the stenographer for mailing. A copybook, which was admitted to be the copybook of the defendant, was shown to Bradley, who identified a letter therein as being a copy of the original, including his signature, which he dictated, signed and directed Mrs. Smith to mail to the plaintiff.

Mrs. Maude Smith, the stenographer, called as a witness on behalf of the defendant, was shown a letter-press copybook containing a copy of the letter claimed to have been written on December 10, 1901, and identified by Mr. Bradley as a copy of the original he had dictated to Mrs. Smith, signed and directed her to mail to the plaintiff. She testified that the letter-press copybook was used in the regular course of business; that the original letter just above referred to was dictated to her by Mr. Bradley; that she had transcribed same, submitted it for his signature, that it was then taken back to her desk and copied into the letter-press copybook and then put into an envelope with the inclosures and mailed, i. e., put on the mailing desk; and that either she or a man who was dead at the time of the trial attended to depositing letters in the U. S. mail box; that the letter-press copybook referred to was used in the regular course of business; that the letter addressed to the plaintiff appears on page 38 thereof; that letters of a similar character were dictated, signed and directed to be mailed to Sate Allen, a sister; G. C. Morgan, (didn't say whether senior or junior); David Morgan, a brother; Marion S. Pierce, a sister; that these letters appear, respectively, in the

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same letter-press copybook on pages 35, 43, 46 and 49, all bearing the same date—December 10, 1901; that as in the letter written to the plaintiff, these letters and inclosures were placed in envelopes, stamped and put on the mailing desk.

Bradley further testified that a reply was received to this letter (of December 10, 1901) from the plaintiff; that the letter in reply was sent to the factory and was placed among the factory files because it related to the account kept on the books of the company; that a diligent search had been made for said letter in all possible places, viz., in the office, in the desk in the vault, that hours had been spent hunting for the missing letter, but that it could not be found. The evidence shows that a fire occurred at defendant's factory in February, 1911, wherein many letters were destroyed. The court permitted Bradley, over the objection of the plaintiff, to testify as to the contents of the letter. He testified that the plaintiff in said letter stated that she had received defendant's letter of December 10, 1901; that the action proposed therein was satisfactory and that it was as agreed upon. Plaintiff denied the receipt of the letter of December 10, 1901, and denied having written a letter in answer thereto.

This letter of December 10th clearly called to the attention of the plaintiff the fact that the real and personal property of the estate of Mrs. Morgan had been divided into seven parts; that the parties to this agreement each should have one-seventh thereof, and assume one-seventh of all claims against same; that an account had been opened on the books for each individual, so that they might understand fully the amount of the indebtedness and the manner of dividing it. Attention was then called to the account of Mary Ella Morgan, the mother, during her lifetime, and payments made on behalf of her estate; and also to the account created by reason of the letter of January 25, 1900, whereby the plaintiff and four others requested defendant to advance a certain amount per

month to Marion S. Morgan, trustee, for household expenses; (this account is shown on the books in the name of Marion S. Morgan, trustee). The letter further stated, "to make everything plain," there was inclosed a statement of her personal account as it appeared on the books after crediting it with the \$2,212 dividend of October 31, 1901, which statement showed an indebtedness of \$3,462.90. The letter further called attention to another dividend to be declared July 1, 1902, of three per cent., which would be credited to her account; that "the account will bear interest at six per cent. (6%), payable quarterly the same as the dividends," and calls attention that while there was a dividend this year, there was no assurance of a dividend next year or any other year; that the accounts inclosed with this letter showed how the balance due on November 1, 1901, was arrived at; that the letter also asked plaintiff in acknowledging receipt of it, to state whether this manner of handling the estate account was perfectly satisfactory.

At the trial "a table of balances and analysis" was prepared by the defendant, which was considered by the court as a correct statement of the account between the plaintiff and defendant; and after having found the issues in favor of the defendant on its plea of set-off, the court used this table as a basis of his finding as to the amount due the defendant from plaintiff.

The only respect in which this "table of balances and analysis" differs from the account submitted in the letter of December 10, 1901, is that the court having found that interest upon the accounts of Mary Ella Morgan, estate of Mary Ella Morgan, and Marion S. Morgan, trustee, had been compounded, deducted the interest so compounded. The new total as arrived at by such reduction accounts for the change in the amount claimed by the defendant due it from the plaintiff, in its statement of defense and set-off, and the amount allowed as found by the court upon which he based his judgment.

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In using this "table of balances and analysis" as the basis of its judgment, it is evident that the court held that the letter of December 10, 1901, from defendant to plaintiff, and the reply thereto by the plaintiff to the defendant, constituted a contract. To arrive at that conclusion, the court had to determine: (1) That the letter of December 10, 1901, was sent and a reply received; and (2) as a matter of law, that such letter and reply thereto constituted a valid and binding contract between the parties.

In arriving at its conclusion as to whether or not the letter of December 10, 1901, had been sent and a reply received, the court, trying this case without a jury, was called upon to weigh the evidence.

On the question whether or not the letter of December 10th had been sent, there is the testimony of J. Harley Bradley that he dictated the letter to the stenographer; the testimony of the stenographer who took the dictation of the letter; the fact that this letter appeared in a copybook used in the regular course of business; that it was one of a series of letters appearing in due order in said copybook; that other letters in this series in the copybook were addressed to the brothers and sisters of the plaintiff.

As to whether or not plaintiff wrote a reply to that letter, there is the testimony of J. Harley Bradley, president of the defendant Company, against the testimony of the plaintiff. There are circumstances in the evidence which might be cited by this court as corroborative of both the testimony of Bradley on behalf of the defendant, and that of the plaintiff on her own behalf. The court, in finding the issues for the defendant, must have concluded that the defendant had shown by the greater weight of the evidence that the letter of December 10, 1901, was sent, and that the plaintiff replied thereto in the manner and in terms as testified to by J. Harley Bradley. Plaintiff complains that this finding is clearly and manifestly against the weight of the evidence.

The court, trying this case without a jury, saw and heard both of them testify, and in arriving at a conclusion as to which side had maintained the issues contended for by a preponderance of the evidence had the right to take into consideration the appearance and demeanor of the witnesses on the stand. We would not be warranted in disturbing the finding of the court unless it were clearly and manifestly against the weight of the evidence. In the case of *Hess v. Killebrew*, 209 Ill. 193, the Court said, (p. 200):

“Where the trial court, in a trial without a jury, has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence. *Lane v. Lesser*, 135 Ill. 567; *Burgett v. Osborne*, 172 id. 227; *Delaney v. Delaney*, 175 id. 187; *Phelan v. Hyland*, 197 id. 395.”

In the case of *Calvert v. Carpenter*, 96 Ill. 63, Mr. Justice Mulkey, in delivering the opinion of the court, uses language which we think is especially applicable to the case at bar. He says (p. 67):

“It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words of the witness as transcribed upon the record, knowing at the same time, from actual experience, that more or less of what the witness actually did say is always lost in the process of transcribing. But the main difficulty does not lie here. There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However artful a corrupt witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bear-

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ing on the stand that betrays him, and thereby destroys the force of his testimony. Many of the real tests of truth by which the artful witness is exposed, in the very nature of things cannot be transcribed upon the record, and hence they can never be considered by this court. For this reason the rule is firmly established, that where, as in this case, there is an irreconcilable conflict in the testimony, this court will not reverse the judgment of the trial court, where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict."

While we are mindful that the rule as stated in the last sentence has been modified by a more recent decision (*Donelson v. East St. Louis & S. Ry. Co.*, 235 Ill. 625), nevertheless such decision does not detract from the truth and vigor of the sentiment expressed by the court as to the value of personal observation of the witnesses by the trial judge in determining the credibility of the witnesses. Having in mind the views so clearly expressed in the above quotations, and after a careful examination of the record, we feel that we cannot say that the finding of the court under the circumstances in evidence in this case was clearly and manifestly against the weight of the evidence.

The court, after having determined that the defendant had proven by a preponderance of the evidence that the letter of December 10, 1901, was sent and was received by the plaintiff, and that the plaintiff replied acknowledging receipt of that letter and expressing her accord therewith, construed these two letters as constituting a binding and valid contract between the plaintiff and defendant. Our reading of the letters and evidence in this case satisfies us that the construction placed on these letters by the trial judge was the correct one.

Necessarily having determined that a contract existed between the parties, there remained only the question of accounting.

Upon this question there was practically no issue in the case. Plaintiff in the stipulation admitted that

the books showed the indebtedness of the mother, and while it reserved to the plaintiff the relevancy and admissibility of the account, yet inasmuch as that account was made a part of the letter, and the court having held that the plaintiff acquiesced and agreed to said accounting in that letter, the account shown in the books became binding upon the plaintiff. There was no dispute as to the amount paid on account of Marion S. Morgan, trustee under the agreement of January 15, 1900, nor was there any dispute as to the entire amount advanced personally to the plaintiff by the defendant. The testimony shows that in addition to the \$1,040 advanced to her up to November 1, 1901, there were additional advances made to her, so that at the time of the trial the entire amount was shown to have been \$7,671.19.

While the plaintiff complains that the court erroneously permitted interest to be charged in the defendant's claim of set-off, yet the contract in this case permitted interest to be charged at the rate of six per cent.

Plaintiff also raised the question that that part of the claim which arose out of the indebtedness incurred by the deceased mother during her lifetime, and the amount paid out by defendant for the indebtedness against her estate, could not be enforced because they were based upon a promise to pay the debt of another, and that there was no memorandum in writing evidencing same. In view of the fact that we are of the opinion that there was a written contract, this contention necessarily must fall.

Plaintiff further contended that the entire action was barred by the statute of limitations. She, however, concedes that under section 17 of the Limitation Act (Hurd's R. S. of Illinois, ch. 83, J. & A. ¶ 7212), defendant had the right to set off claims against the plaintiff which were not barred on January 31, 1910, being the earliest item sued for by the plaintiff. This

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issue is disposed of by our holding that there was a written contract entered into by the parties in December, 1901. By this written contract, plaintiff agreed to pay all items prior to that period, and authorized charging her account with later items making up the amount of the judgment not covered by this written agreement.

Finding no reversible error, the judgment of the Municipal Court will be affirmed.

Affirmed.

**Benjamin Wolf, Plaintiff in Error, v. Elizabeth Gloor,
Defendant in Error.**

Gen. No. 20,050. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by Benjamin Wolf against Elizabeth Gloor to recover a balance alleged to be due for legal services rendered and expenses incurred in securing the appointment of defendant as guardian of her grandchild, Catherine Gloor. A trial was had before the court and a jury, resulting in a verdict in favor of defendant. To reverse a judgment entered on the verdict, plaintiff prosecutes a writ of error.

GEORGE A. McCORKLE and BENJAMIN WOLF, for plaintiff in error.

ANDERSON, ANDERSON & ANDERSON, for defendant in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

ATTORNEY AND CLIENT, § 135*—*when evidence sufficient to sustain verdict.* In an action by an attorney for a balance due for legal services and expenses incurred in securing the appointment of defendant as guardian of her grandchild, where evidence was introduced as to the value of the services and there was evidence to show that defendant had paid plaintiff five hundred dollars, *held* that a verdict for defendant was sustained by the evidence.

Levy Goldstein, trading as L. Goldstein & Company,
Defendant in Error, v. Gustave Freudenberg, trad-
ing as G. Freudenberg & Company, Plaintiffs in
Error.

Gen. No. 19,486. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action of the fourth class in the Municipal Court of Chicago by Levy Goldstein, trading as L. Goldstein & Company, against Gustave Freudenberg, trading as G. Freudenberg & Company, to recover \$242.50 alleged to be due from defendant to plaintiff as a commission for securing a purchaser for certain real estate. Plaintiff's statement of claim was as follows:

"On or about December, 1909, plaintiff and defendant, were both duly licensed real estate brokers in the City of Chicago. Plaintiff further represents that on or about said time, the said defendant had listed for sale a certain property at No. 1435 Milwaukee avenue by one Mandel Brown. Plaintiff further alleges that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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said defendant, through his agent, Herman Weinberger, submitted the aforesaid real estate to plaintiff for the purpose of securing a purchaser therefor, and that said defendant through his said agent agreed to pay plaintiff one-half of any and all sums which he would receive as compensation for the sale of said real estate to any customer secured by said plaintiff. Plaintiff further alleges that he secured one L. Herman as a purchaser for said premises and that the said defendant has received as compensation for the sale of said premises, the sum of four hundred and eighty-five dollars (\$485), one-half of which amounting to two hundred forty-two dollars and fifty cents (\$242.50), and said defendant refused and still refuses to pay said sum, to the damage of the plaintiff in the sum of two hundred forty-two dollars and fifty cents (\$242.50), therefore he brings his suit."

The defendant filed an affidavit of merits, the material part of which was as follows:

"Defendant denied that he did heretofore at any time have listed for sale a certain property at No. 1435 Milwaukee avenue, by one Mandel Brown. This affiant further denies that one Herman Weinberger was at any time heretofore his duly authorized agent for any purpose whatsoever. This affiant further denies that he did at any time heretofore offer Herman Weinberger or any one else whatsoever the real estate at No. 1435 Milwaukee avenue to the plaintiff for the purpose of securing a purchaser for said real estate; and defendant further denies that he agreed to pay to the plaintiff one-half of any sums which he would receive as compensation for the sale of said real estate."

The case was tried by the court without a jury; the issues were found against the defendant and the plaintiff's damages were assessed at \$177.50. A motion for a new trial was overruled. To reverse a judgment entered on the finding, defendant prosecutes a writ of error.

SHAEFFER & KOMPTEL, for plaintiff in error.

I. B. PERLMAN and H. J. ROSENBERG, for defendant in error.

MR. JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 88***—*when finding of court not contrary to law.* In a suit by one real estate agent against another for a commission for procuring a purchaser for real estate, where it was alleged that an agent of defendant had listed the property with plaintiff, *held* under the evidence that a finding in favor of plaintiff was not contrary to law for the reason that the alleged agent was without authority to act for defendant or that he exceeded his authority.

2. **BROKERS, § 84***—*admissibility of evidence.* In a suit by one real estate agent against another to recover a commission for procuring a purchaser for real estate listed with plaintiff by an alleged agent of defendant, *held* that the evidence was sufficient to show that the alleged agent was an agent of the defendant so as to justify the admission of the testimony of plaintiff as to a conversation he claimed to have with such person as defendant's agent.

3. **EVIDENCE, § 173***—*when telephone conversation admissible.* A telephone conversation is admissible where it was held by the plaintiff with the defendant, at the defendant's place of business or with someone there that professed to represent him, and where it was in relation to the business of the defendant carried on at that place.

4. **APPEAL AND ERROR, § 1512***—*when action of court in stopping witness not reversible error.* The trial court is not shown to have erred in excluding evidence offered by defendant, where the defendant as a witness was asked a question by his counsel and the witness answered it and then proceeded to say more, and the court stopped him with the remark: "Don't say anything more," it also appearing that counsel for defendant not only failed to object to the action of the court, but expressly acquiesced therein.

5. **APPEAL AND ERROR, § 1506***—*when refusal to permit witness to testify not reversible error.* Action of trial court in refusing to permit a witness to testify, *held* not an abuse of discretion requiring a reversal, where it appeared the witness violated a rule excluding witnesses from the courtroom, and no objection was made to the action of the court nor any showing made that he would testify to any fact material to the issues in the case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Abraham Manaster, Defendant in Error, v. Herman Molner, Plaintiff in Error.

Gen. No. 19,743. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed October 8, 1914. Rehearing denied and additional opinion filed December 31, 1914.

Statement of the Case.

Action of the fourth class in the Municipal Court of Chicago by Abraham Manaster against Herman Molner to recover one month's rent of \$105, alleged to be due under a certain lease made between plaintiff as lessor and one S. Silber as lessee, which lease was guarantied by the defendant. The lease provided that the lessor should construct a bakeshop in the rear portion of the first floor of the building, and was made when the premises were occupied by one Goldstein. Rent was collected from said Goldstein after the making of the lease, and Goldstein claimed that the landlord had elected to treat him as a tenant from year to year. A forcible entry and detainer suit was brought against Goldstein and resulted in a verdict for the defendant, whereupon an appeal was prayed. Silber occupied the portion of the premises not occupied by Goldstein and some other property also belonging to the plaintiff. At the trial the issues were found in favor of the plaintiff, and this writ of error followed.

JACOB C. LeBOSKY, for plaintiff in error.

TENNEY, HARDING & SHERMAN, for defendant in error.

MR. JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 88*—*when tenancy from year to year created*. Evidence held to show that a landlord acted as an agent of his lessee in collecting rent from another person who occupied the premises at the time of the making of the lease, and such landlord did not by accepting the rent elect to treat such other person as a tenant from year to year of the premises.

2. JUDGMENT, § 457*—*when decree is res adjudicata*. A person cannot be injuriously affected by a judgment or decree of court who was not a party to such judgment or decree and was not in any way interested therein.

3. JUDGMENT, § 457*—*when party bound by former adjudication*. Evidence held to support a finding that a party was not interested in a prior forcible entry and detainer suit, wherefore the judgment in such suit was not *res adjudicata*.

4. LANDLORD AND TENANT, § 448*—*when different premises are substituted*. Evidence held not to sustain a contention that there was a substitution by a landlord of other premises for those leased.

August Jacobs, Defendant in Error, v. Henry T. Jurgensen et al., trading as Jurgensen Tea Company, Henry T. Jurgensen, Plaintiff in Error.

Gen. No. 19,767. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 31, 1914.

Statement of the Case.

'Action of forcible entry and detainer by August Jacobs against Henry T. Jurgensen and John F. Jurgensen, trading as Jurgensen Tea Company. The action proceeded against Henry T. Jurgensen alone, the other party not being served, and it appearing that such other party had terminated business relations with the defendant. The premises involved were

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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leased to the defendant under a lease providing for forfeiture if the rent remained unpaid after the first of the month. It appeared, however, that the check in payment of the rent was usually mailed by the defendant to the plaintiff a few days after the first, and on the occasion in question such monthly check was not received until thirteen days after the first of the month, when it was returned and these proceedings instituted. At the close of the trial a verdict was directed for the plaintiff, whereupon the defendant, Henry T. Jurgensen, brought error.

JOHN C. TRAINOR, for plaintiff in error.

G. A. DAHLBERG, for defendant in error; GURDON WILLIAMS, of counsel.

MR. JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 470*—*when waiver of forfeiture will be presumed.* Where a lease provided that the landlord might declare a forfeiture of the same because of the failure of the lessee to pay the rent when due, such landlord had the right to waive the forfeiture, and waiver would be presumed until he did some act manifesting an intention to declare a forfeiture.

2. APPEAL AND ERROR, § 913*—*when stenographic report complete.* Where a certificate to the stenographic report states that it contains "all the evidence and testimony offered, heard or received on the hearing of the above entitled cause," it cannot be contended that the report is not in fact complete.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Mary Christ, Appellee, v. Chicago Railways Company,
Appellant.**

Gen. No. 19,918. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOORRY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 31, 1914. Rehearing denied January 8, 1915.

Statement of the Case.

Action on the case by Mary Christ against the Chicago Railways Company to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant in jerking or starting a street car as the plaintiff was alighting therefrom. The defendant filed pleas of the general issue and nonownership. The case was tried before a court and a jury, and verdict returned finding the defendant guilty and assessing plaintiff's damages at one thousand five hundred dollars. The plaintiff remitted five hundred dollars from the amount assessed, a motion for new trial was overruled and judgment entered on the verdict for one thousand dollars. To reverse said judgment, the defendant appealed.

CHARLES L. MAHONY and ALFRED B. DAVIS, for appellant; JOHN R. GUILLIAMS and FRANK L. KRIETE, of counsel.

SPENCER WARD, for appellee.

MR. JUSTICE SCANLAN delivered the opinion of the court.

Christ v. Chicago Railways Co., 191 Ill. App. 69.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1410***—*when verdict will not be disturbed.* In an action for personal injuries sustained while alighting from a street car, a verdict in favor of the plaintiff was not manifestly against the weight of the evidence.

2. **DAMAGES, § 112***—*when verdict not excessive.* In an action for personal injuries sustained by a woman while alighting from a street car, due to the car starting suddenly, a verdict of fifteen hundred dollars reduced to one thousand dollars was not excessive.

3. **APPEAL AND ERROR, § 1535***—*when instruction cannot be complained of.* In an action for personal injuries sustained while alighting from a street car, the giving of an instruction as to the burden of proof which omitted the element of the number of witnesses testifying pro and con upon the controverted material facts in the case was error, but a defendant was not warranted in complaining of it where the record did not show that the question of the number of witnesses was an important element in the case, and that it suffered by the giving of the instruction.

4. **APPEAL AND ERROR, § 1544***—*when erroneous instruction as to contributory negligence harmless.* In an action for personal injuries sustained while alighting from a street car, the giving of an instruction as to the burden of proof, stating that the jury "should" take into consideration the elements named in the instruction, was erroneous as misleading and as tending to invade the province of the jury, and the word "may" should have been used, but in view of the state of the record, the giving of the instruction was harmless error.

5. **APPEAL AND ERROR, § 1565***—*when modification of instruction harmless.* In an action for personal injuries, the modification of an instruction as to the credibility of witnesses, by striking out the words requiring the jury to consider testimony "the same as you would receive the testimony of any other witness," did not constitute reversible error, as the meaning of the instruction was not changed by the modification.

6. **APPEAL AND ERROR, § 1565***—*when modification of instruction as to contributory negligence harmless.* In an action for personal injuries sustained by a passenger while alighting from a street car, where an instruction requiring the plaintiff to use her faculties with ordinary care only "in looking out for danger" was modified by striking out the quoted words, the modification was not harmful to the defendant, as in the instruction as given there was no limitation as to the care that the plaintiff was required to use to avoid injury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

J. J. Nartzik, Appellee, v. Fred C. Ehman, Appellant.**Gen. No. 19,946.**

1. **CREDITORS' SUIT, § 40***—*when receiver may be appointed.* A receiver for property may properly be appointed in a suit before the defendant has answered, where the complainant can satisfy the chancellor that he has an equitable claim to the property and that the receiver is necessary to preserve it from loss, or where a clear case of fraud is shown, or of imminent danger to the property, and such procedure is especially proper in cases of creditors' bills in aid of the enforcement of judgments.

2. **RECEIVERS, § 3***—*what is nature of receiver.* A receiver is an indifferent person between the parties, appointed by the court, and on behalf of all parties, to receive the thing or property in litigation pending the suit,

3. **RECEIVERS, § 18***—*when may take possession.* Where the assets are openly visible, the receiver can at once take actual possession, but where their character, amount and whereabouts are unknown, a court of chancery may require a defendant to appear before it and submit to an examination.

4. **APPEAL AND ERROR, § 1416***—*when findings of master are supported by evidence.* Evidence held sufficient to support findings of fact of a master and his recommendations even though a defendant appeared as a witness and specifically denied the truth of the charges against him.

Appeal from the Superior Court of Cook county; the Hon. WILLIAM EL DEVEE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 31, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. This was a bill in the nature of a creditor's bill in the Superior Court of Cook county, filed November 6, 1912, by J. J. Nartzik, appellee, a judgment creditor, herein-after called the complainant, against C. Ehman and Company, a corporation, the judgment debtor. The bill named as codefendants Charles Ehman, president of the said corporation, Fred C. Ehman, a former treasurer of said corporation, Adolph C. Ehman, a former secretary of said corporation, Alma B. Burk-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

hardt, Fritz Goetz and Albert Goetz. Fred C. Ehman, appellant, is the only defendant that is interested in this appeal, and he will be hereinafter referred to as the defendant. The bill, in substance, alleges that on June 22, 1912, complainant recovered a judgment in the Municipal Court of Chicago for \$2,352.14 against said corporation; that execution issued to the sheriff was returned wholly unsatisfied; the return showing no property found; that the said corporation has property which it keeps concealed or to which the title is held in trust; that certain of its property was fraudulently transferred; that the persons to whom such fraudulent transfers were made are the codefendants named in said bill; that all of said property (naming it in detail) is in the name of or in the control of said codefendants, but equitably belongs to said corporation. On motion of the complainant, on November 7, 1912, a receiver was appointed and an order entered directing that the principal defendant assign, transfer and deliver to said receiver in advance, under the direction of the master in chancery named by the court, all such property; that it deliver to said receiver in like manner, all bills, notes, contracts, books of account, etc.; and it was further ordered that the cause be referred to a master in chancery, to examine the principal defendant, codefendants, officers or agents of said corporation, and such other witnesses as might be produced before said master, concerning things in action, equitable interests and effects of the principal defendant, and report his findings to the court, together with his conclusions thereon, and that the defendant, C. Ehman & Company, its officers and agents and the other defendants shall appear from time to time when summoned to do so by the master, and produce books and accounts and submit to examination. On November 12, 1912, before answer was filed by any of the defendants, hearing on the said reference was had before the master and thereafter he made the following re-

port of his findings and recommendations; that C. Ehman & Company was an Illinois corporation doing business in the city of Decatur, manufacturing veneered doors; that Charles Ehman was president of the company; that Adolph C. Ehman was secretary; that Fred C. Ehman was treasurer; that Charles Ehman was the father of Adolph C. and Fred C. Ehman; that the checks drawn by the company prior to January 7, 1911, were signed by Charles Ehman, president, and Fred C. Ehman, treasurer; that checks signed by either Charles Ehman or Fred C. Ehman were recognized by the banks; that on January 7, 1911, the plant of the company, including machinery, materials, buildings, books of account, papers, insurance policies, deeds, notes, etc., were destroyed by fire; that prior to the fire the assets of the judgment debtor over and above its liabilities were \$150,000; that the judgment debtor carried \$128,000 fire insurance; that subsequent to the fire there was collected by the judgment debtor or its officers on the fire loss, the sum of \$111,000; that at the time of the fire the bills receivable of the company amounted to from \$40,000 to \$60,000; that the books of the company were destroyed by the fire; that a new set of books was made; that the new books show bills receivable amounting to \$30,000; that since the fire the greater part of that amount has been collected by the principal defendant or its officers; that prior to the fire the total indebtedness, including notes held by the banks and bills payable, did not exceed \$40,000; that a statement made September 1, 1910, showing assets and liabilities of the principal defendant, showed a total indebtedness of \$33,495.71; that the testimony of Fred C. Ehman, treasurer, was that in January, 1911, the indebtedness might be a little but not very much in excess of that sum, but that the indebtedness would not in any event exceed \$40,000; that all claims except two against the judgment debtor have been paid since the fire, and that one of these is the judgment of the

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complainant; that both of the claims were disputed; that from January 2, 1911, until the first of May, 1911, there was deposited in the Citizens National Bank of Decatur to the credit of the judgment debtor a sum in excess of \$82,000, and the said account was subject to checks signed by either Charles Ehman, president, or Fred C. Ehman, treasurer; that the amount deposited in the Monroe National Bank of Chicago, where deposits were made subsequent to the fire, does not appear, nor does it appear what amount has been collected from the outstanding accounts receivable; that it is admitted that there was \$111,000 collected from the insurance, and it is shown that \$82,000 of that sum was deposited in the Citizens National Bank of Decatur; that, therefore, there would necessarily be in the neighborhood of \$29,000 of insurance money deposited in the Monroe National Bank of Chicago, or elsewhere; that of the \$30,000 accounts receivable that existed at the time of the fire and which appear upon the new books of the judgment debtor that were prepared subsequent to the fire, such of these accounts as had not been collected were turned over to Albert Goetz for collection and that the total amount he collected from such accounts was \$882.97; that it is apparent that a large portion of the \$30,000 of the accounts receivable had been collected prior to the time certain of such accounts had been turned over to Mr. Goetz, but the amount collected does not appear; that Fred C. Ehman testified that on April 4, 1911, there was a meeting in Decatur of himself, his father, and his brother, Adolph C. Ehman, who were officers and directors of the judgment debtor, and that it was then resolved that the affairs of the judgment debtor be wound up and the inventory business of the judgment be turned over to C. Ehman for his attention, and that thereafter he, Fred C. Ehman, gave little attention to the affairs of the judgment debtor; that subsequent developments, however, as shown by the evidence of

the several witnesses as well as by the admissions of Fred C. Ehman, disprove this statement; that it appears that certain garnishment proceedings had been instituted against the judgment debtor in Mississippi, "and that some time in the month of July, 1911, Fred C. Ehman was instrumental in supplying a bond with the Continental & Commercial Bank as trustee, indemnifying the various insurance companies against the said garnishment proceedings, and that thereafter the various insurance policies that had been affected by the garnishment proceedings were paid;" that it also appears that subsequent to the said date, April 4th, Fred C. Ehman sold or was instrumental in selling a lot of doors, aggregating a thousand or more, to one Krumhaar for which he received \$900; that it also appears that in August, 1912, he collected an account of \$300, and at other times made trips to Philadelphia, New York, Jersey City, Trenton, Louisville and divers other places, for the purpose of looking after the collection of other accounts; that in addition to all these facts, Charles Ehman, president of the judgment debtor and father of Fred C. Ehman, testified that Fred C. Ehman had charge of the collection of all the insurance and the payment of all the bills payable, and that the funds deposited in the Citizens National Bank of Decatur and the Monroe National Bank of Chicago were subject to the check of the said Fred C. Ehman; that Albert Goetz testified that Fred C. Ehman was the only man who knew anything about the affairs of the judgment debtor; that whether the affairs of the judgment debtor subsequent to April 4, 1911, were turned over to C. Ehman, and the funds which had been collected, disbursed by him, or whether Fred C. Ehman had charge of the funds that had been collected from the insurance companies and outstanding accounts and disbursed by him becomes merely a question of veracity between Fred C. Ehman, the son, and C. Ehman, the father; that C. Ehman is a man approximately seventy

years old, whose manner upon the witness stand and whose conduct and appearances impressed the master that he was truthful and sincere in the testimony he gave; that but one conclusion is possible in weighing the testimony of C. Ehman as against that of Fred C. Ehman and the various circumstances in evidence, the activity of Fred C. Ehman subsequent to April 4th, in attending to the affairs of the judgment debtor, his familiarity with the details of all the business interests, as well as the outstanding accounts, leads to the inevitable conclusion that Fred C. Ehman was the guiding spirit of the judgment debtor, C. Ehman & Company, and that he had charge and supervision of the funds of the judgment debtor, received the insurance for the judgment debtor and the bills payable to the judgment debtor, and whatever disbursements have been made were made by him. By his own evidence it is impossible that he could have disbursed legitimately, in behalf of the judgment debtor, more than \$40,000 of the sums which he received, and that he would necessarily have in his possession \$71,000 from the insurance collected, entirely independent of the further item of \$5,000 that was paid the judgment debtor for salvage subsequent to the fire and the sum that was collected, subsequent to the fire, from the outstanding accounts; that C. Ehman, the father, testified positively that he never received from the judgment debtor, subsequent to the time of the fire, an amount to exceed \$1,500; that the master finds from the evidence and the circumstances in evidence that his statement in that regard was true. The master further found:

"11. I further find that on the 3rd of August, 1912, co-defendant Fred C. Ehman collected from George Foster of Dayton, Ohio, the sum of \$300 which was due the judgment debtor, and that that amount belongs to the judgment debtor and should be turned over to the receiver.

"12. I further find that co-defendant Fred C.

Ehman has in his possession at the plant of F. C. Ehman & Company, No. 1638 Clybourne avenue, Chicago, Illinois, a lot of doors that belong to C. Ehman & Company, and which should be turned over to the receiver.

"12. I further find from the evidence that co-defendant, Fred C. Ehman, in April, 1911, (shortly subsequent to the fire) went into business in Chicago as a money lender, and he has testified in these proceedings that he loans as high as \$70,000 at a time. It also appears from the evidence that his salary with C. Ehman & Company was terminated on or about April 4, 1911, and that prior to that time it had been \$200 per month.

"13. I further find from the evidence that co-defendant, C. Ehman, has no property, real or personal, and so far as it appears from the evidence, his sole means of support is the sum of \$50, being payments upon the purchase price of property that he held in Chicago, together with small payments from a life insurance policy.

"14. I further find from the evidence and exhibits in evidence, that the judgment upon which this proceeding was instituted was \$2,352.14, and plaintiff's costs thereon was \$37.40; that said judgment was entered on the 22nd day of June, 1912, in the Municipal Court of the City of Chicago; interest on said judgment from June 22nd to December 22nd, 1912, is \$58.80; costs of the present proceeding amounting to \$500, approximately, including Master's fees and stenographer's fees, but exclusive of receiver's fees, makes a total of approximately \$2,948.14.

"RECOMMENDATION.

"I recommend that an order be entered herein, directing the said Fred C. Ehman that he deliver to the receiver the sum of \$300 that was collected by him from George Foster.

"I also recommend that he turn over to the said receiver, all of the doors in his possession at Clybourne avenue, at the plant of F. C. Ehman & Company, or elsewhere.

"I also recommend that he be ordered to turn over

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to the said receiver such additional sum in currency as will be sufficient to satisfy in full the said judgment entered in the Municipal Court of Chicago on the 22nd of June, 1912, in favor of J. J. Nartzik, against C. Ehman & Company, a corporation, and costs thereon, including the costs of this proceeding, being in the aggregate approximately \$2,948.14.

"All of which is respectfully submitted.

"Dated Chicago, December 23rd, A. D. 1912.

CHARLES J. TRAINOR,
Master in Chancery of the Superior
Court of Cook County."

The defendant's exceptions to the master's report were overruled and the court entered the following order:

"This matter coming on to be heard on this 20th day of January, A. D. 1913, upon notice to all parties, and the court being fully advised in the premises, and having before it the report of the Master, together with the evidence declared before said Master, and being fully cognizant of the condition of things finds:

"First, that it has jurisdiction of the parties hereto, and subject matter hereof.

"Second, that the Master's report is correct and proper in all respects, and the Master's findings are true.

"Third, that an order should be entered in accordance with the findings of the Master.

"Wherefore, it is ordered and adjudged that the Master's report be and the same hereby is confirmed and approved in all things, and the exceptions thereto of Fred C. Ehman are each hereby severally overruled.

"It is further ordered that Fred C. Ehman, defendant, do turn over to Wm. F. Zibell, receiver herein, the sum of \$2,948.14, and do also turn over to the said Wm. F. Zibell all doors now in his possession, and located at the plant of Fred C. Ehman & Company, a corporation in Chicago, Illinois; that he further turn over the sum of Three Hundred (\$300) Dollars in addition, all within the period of ten days in accordance with the finding of the Master."

To reverse this order, the defendant prosecutes this appeal.

LIPSON & LEVY and HENRY S. BLUM, for appellant.

EASTMAN & WHITE, for appellee; RALPH B. HAWKHURST, of counsel.

MR. JUSTICE SCANLAN delivered the opinion of the court.

The defendant contends, and argues at some length, that the order in this case is an appealable one, but as the complainant appears to concede the correctness of this contention, we have not deemed it necessary to pass upon the question.

The next contention of the defendant can, perhaps, be best stated by a quotation from his brief: "There was a controversy here which should go to a hearing. The court should obtain jurisdiction of the parties, issues should be formed upon the pleadings and a trial should be conducted in the regular and orderly course of procedure. Instead, the regular and orderly course of procedure was suddenly and ruthlessly wiped out. * * * Here in this finding and on the decree based thereon we have every essential of an ultimate finding and decree. Nothing to be determined by an ultimate hearing was not determined here, and it was determined without jurisdiction, without pleadings, and without a defense or opportunity for a defense by the defendant. * * * The issues should be formed, a final reference to a master should be made upon the ultimate issues of the case, the two sides should marshal their forces and produce their witnesses and testimony. *The case should be heard.* * * * We have not insisted that this question is one strictly of jurisdiction. That may be a point of terminology. It is entirely satisfactory to us to have it considered merely as a question of common sense in practice,

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procedure and substantive law. The purpose of a receivership and the preliminary reference is to maintain the *status quo*, not to alter it. But behold, before the facts can be developed a decree is entered, upon which execution against the property, or attachment against the body of this defendant can be issued. * * * We believe the question is jurisdictional. But we say, in any event *it is error.*" The defendant further contends, in support of his present proposition, that, even if it be conceded that there was evidence introduced before the master tending to establish the charges made by the complainant against him, still, in view of the fact that the defendant testified before the master and denied the truth of the charges, the order complained of could not properly be entered against him, until after the final hearing of the case; that the chancellor, upon the report of the master, at most, might perhaps have properly issued an injunction against the defendant to restrain him from disposing of any moneys or property belonging to Ehman & Company.

The power of the court to appoint a receiver and to place in his custody the property in controversy, before the defendant has answered, has become a well established practice in this country, in cases where the complainant can satisfy the chancellor that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve it from loss, or where a clear case of fraud is shown, or of imminent danger to the property, unless the relief is granted. "If the emergency shown is such as to render it essential to justice that a receiver should be immediately appointed, it may be done before answer, since to delay the relief might entirely defeat the object sought by the application. The practice is especially salutary in cases of creditors' bills in aid of the enforcement of judgments, and in this class of cases receivers are almost uniformly granted before answer. While the practice of appointing receivers

before answer, in cases of emergency, is thus shown to be well established and generally followed by courts of equity in this country, yet the grounds which will induce the court to interfere at this stage of a cause must be very strong, and there must be clear proof of fraud, or of immediate danger to the property unless it is taken into the custody of the court." High on Receivers, secs. 105, 106. The practice of appointing receivers *pendente lite* is well established in this State, and the courts are not required to wait until the defendant to the bill has gone through the process of pleading before the appointment may be made. *Railton v. People*, 83 Ill. App. 396; *Railton v. People*, 85 Ill. App. 384; *Chicago Title & Trust Co. v. Chapman*, 132 Ill. App. 55; *Baker v. Backus' Adm'r*, 32 Ill. 79; *Daley v. Nelson*, 119 Ill. App. 627. "The power of appointment (*pendente lite*) is usually invoked either for the prevention of fraud, to save the subject of litigation from material injury, or to rescue it from threatened destruction." High on Receivers, sec. 11; *Baker v. Backus' Adm'r*, *supra*. "The great object is to secure the property or thing in controversy, so that it may be subjected to such order or decree as the court may make in the particular case." *Mays v. Rose*, Freem. (Miss.) 718. Where a defendant is in the possession and enjoyment of the property in controversy, equity always proceeds with extreme caution in taking possession of the property by its receiver, but in all such cases a large discretion must be vested in the chancellor, and the question as to whether or not this discretion has been properly exercised must be determined by the particular facts of each case. Before answer there must be clear proof of fraud, or of imminent danger to the property, before the court through its receiver will take custody of the same. High on Receivers, secs. 191-198. "Courts of equity have the power upon appointing receivers, to order them to take possession of the property which is in-

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volved in the controversy, and when such possession is withheld by persons who are parties to the suit, or by others who are claiming under such parties, with notice of the appointment of the receiver, the court may interfere in a summary way and order the delivery of the property, and may enforce its order by writ of assistance, or attachment." 34 Cyc. of Law and Procedure, p. 204. "Where the assets are openly visible, the receiver can at once take actual possession, but where their character, amount and whereabouts are unknown, the power of the court is necessarily invoked to aid the receiver in the discovery and obtaining such possession. This is done by an order requiring the defendant and others to appear before the master and submit to an examination touching the location, amount and character of the property and effects to the possession of which the receiver is entitled." Henderson on Chancery Practice, p. 360. A court of chancery may, of course, require a defendant to appear before it and submit to a like examination.

The defendant strenuously contends that the decretal order in this case is not in any way preliminary in its nature; that it, by its very wording, "makes an ultimate disposition of the controversy between the corporation, through its receiver, on the one hand, and Fred C. Ehman on the other hand, on the question whether Fred C. Ehman received any of the company's money which he failed to disburse. * * * In other words, the only controversy in which Fred C. Ehman is interested, viz., Has he the company's money? they believe to be preliminary, and expect to dispose of preliminarily, without according him the rights of a party litigant, or the benefit of the system of pleading, practice, procedure or evidence to which every litigant is entitled." We think the defendant misconceives the effect of the interlocutory decretal order entered in this case. "A receiver is defined to be an indifferent person between the parties, appointed by the court,

and on behalf of all parties, and not of the complainant or one defendant only, to receive the thing or property in litigation, pending the suit." *Baker v. Backus' Adm'r, supra*; *St. Louis & S. Coal & Mining Co. v. Sandoval Coal & Mining Co.*, 111 Ill. 32; *Railton v. People, supra*. The possession of the property in question by the receiver is the possession of the court, held equally for the greater safety of all the parties concerned. High on Receivers, p. 19; see also sec. 15. The receiver acquires no title to the property by the appointment, but only the right of possession as the officer of the court. He is a mere custodian pending the litigation. The parties who have the title at the time of the appointment retain it. "The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties as they may be determined by the judgment in the action." *Heffron v. Gage*, 149 Ill. 182. To the same effect is *Nevitt v. Woodburn*, 190 Ill. 283.

The defendant strenuously contends that the master's findings of fact are not justified by the proof, and that the order in question was not warranted on the merits of the case. We have examined with care the evidence heard before the master, and we are satisfied that there is no merit in the defendant's present contention. In our judgment, the master's findings are fully warranted by the proof. There is no force in the defendant's contention that because he appeared before the master as a witness and, in answers to certain questions, specifically denied the truth of the charges made by the complainant against him, that this fact alone precluded the master from making findings of fact against him, and the chancellor from entering the order in question. After a consideration of the entire evidence heard before the master and of the law governing the case, we are satisfied that the chancellor acted justly and properly in entering the order in question in this case.

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The order of the Superior Court of Cook county will be affirmed.

Affirmed.

**Walter R. Swan and Wilbur P. Cooper, Administrators,
Appellees, v. Boston Store of Chicago, Appellant.**

Gen. No. 19,976. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Action by Walter R. Swan and Wilbur P. Cooper, administrators of the estate of Eugene E. Swan, against the Boston Store of Chicago for wrongfully causing the death of plaintiff's intestate, a boy five years old. On the first trial the plaintiffs secured a judgment for ten thousand dollars, and on appeal such judgment was reversed and the cause remanded (177 Ill. App. 349). At this second trial a judgment of five thousand dollars was rendered in favor of the plaintiffs, and the defendant appealed.

WINSTON, PAYNE, STRAWN & SHAW for appellant;
EDWARD W. EVERETT and CHARLES J. McFADDEN, of
counsel.

FREDERICK Z. MARX, for appellees.

MR. JUSTICE SCANLAN delivered the opinion of the court.

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Abstract of the Decision.

1. **ELEVATORS, § 22***—*when finding of negligence sustained by evidence.* Evidence held to show that a five-year-old boy was killed by the sudden starting of an elevator when his one foot was on the floor as he was about to leave the elevator, causing him to fall into the elevator shaft, even though one witness answered a question as to the length of time of the accident,—which question enumerated a member of supposed happenings, such as a supposition that the boy was off the car and jumped to get on it,—in the affirmative.

2. **NEGLIGENCE, § 107***—*when negligence of parent will be imputed to child.* In an action by parents, or personal representatives, the negligence of such parents of a child of tender years, which contributes to an injury resulting in death, is imputable to the child.

3. **NEGLIGENCE, § 202***—*when question of imputed negligence for jury.* The rule that the question as to whether or not a person is in the exercise of ordinary care is usually for the jury, is applicable to a case where a mother is charged with negligence contributing to the injury of her child.

4. **ELEVATOR, § 7***—*what duty of operator.* Persons operating elevators are carriers of passengers, and such passengers have a right to rely for their safety upon the efficient management of the conductor thereof.

5. **NEGLIGENCE, § 109***—*when parents negligent as matter of law.* Evidence held not to show as a conclusion of fact or as a matter of law that a mother of a five-year-old boy was guilty of negligence proximately contributing to the child's injury, though she released her hold of the boy while leaving the car, the accident being due to the sudden starting of the elevator.

6. **ELEVATOR, § 19***—*when operator negligent.* Evidence held to show that an operator of an elevator was guilty of gross negligence in starting the car while passengers were alighting.

7. **DEATH, § 67***—*when verdict not excessive.* A verdict of five thousand dollars for the death of a five-year-old boy killed by falling into an elevator shaft, held not excessive.

8. **NEW TRIAL, § 28***—*when new trial properly refused.* The refusal of a new trial because a juror made incorrect and misleading answers on his *votr dire*, held not improper, since it did not appear that the juror was prejudiced or biased against the defendant.

9. **APPEAL AND ERROR, § 474***—*when misconduct of counsel will not be considered on appeal.* A contention that an attorney made improper remarks to the jury will not be considered on appeal

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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where no attention is called to the specific part of her argument which is contended to be prejudicial.

10. TRIAL, § 121*—*what argument of counsel proper*. It is not prejudicial error for an attorney to tell the jury what he considers a fair compensation for a plaintiff's injuries.

11. TRIAL, § 128*—*what remarks of counsel not objectionable*. Remarks of an attorney in a personal injury case, in stating his version of what occurred in his office, are improper, but harmless error when the result is not affected.

12. APPEAL AND ERROR, § 474*—*when objection must be made to remarks of counsel*. An appellant cannot complain of remarks of an attorney in argument when no objection was made to such remarks at the trial.

The People of the State of Illinois, Defendant in Error, v. Romald Waltyn, Plaintiff in Error.

Gen. No. 20,153.

1. LARCENY, § 3*—*what is nature of crime*. Under the common law petit larceny was a felony, but in this State it is made a misdemeanor by statute (Hurd's R. S. 1912, ch. 38, sec. 168, J. & A. ¶ 3792), and the offense has been removed from the category of infamous crimes (J. & A. ¶ 3972).

2. INDICTMENT AND INFORMATION, § 41*—*how offense must be described*. Where a statute defines an offense, no essential element thereof as defined by the statute can be omitted from the indictment or information, but it is not necessary to use the very words of the statute.

3. LARCENY, § 21*—*when felonious taking sufficiently described in information*. The word "steal" has a uniform signification and means the felonious taking and carrying away of the goods of another.

4. LARCENY, § 21*—*when information sufficient*. In an information charging petit larceny, if the use of the word "feloniously" is essential to charge the offense, the word "steal" is sufficient to charge such felonious intent.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

5. LARCENY, § 3*—*necessity for felonious intent*. A larcenous intent, that is an intent to steal, is clearly an essential element in petit larceny, but a felonious intent seems neither a necessary nor an appropriate averment in a misdemeanor case.

Error to the Municipal Court of Chicago; the Hon. HUGH R. STEWART, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 31, 1914.

LOUIS GREENBERG and WILLIAM A. JONES, for plaintiff in error.

MACLAY HOYNE and EDWARD E. WILSON, for defendant in error.

MR. JUSTICE SCANLAN delivered the opinion of the court.

The plaintiff in error was charged in an information filed in the Municipal Court of Chicago with the offense of petit larceny. He waived a trial by jury, pleaded not guilty, and on the hearing of the case by the court was found guilty of petit larceny, and was sentenced to be imprisoned in the House of Correction for the period of sixty days and to pay a fine of \$50. Only a common-law record is filed in this court.

The information charged, in substance, that the defendant on February 10, 1913, in the City of Chicago, County of Cook and State of Illinois, "one silver coffee pot, three dessert knives, three table spoons, four ice tea spoons, three table spoons, three table forks, of the value of Fifteen Dollars, the personal goods and property of the Chicago, Burlington and Quincy Railroad Company, the same being a corporation then and there being found, did then and there wrongfully and unlawfully take, steal and carry away, contrary to the statute," etc.

The plaintiff in error contends that the offense of petit larceny was not sufficiently charged in the in-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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formation, "on the ground that the information failed to charge the plaintiff in error with the statutory or common-law offense of larceny, in failing to allege that the plaintiff in error '*feloniously*' did steal, take and carry away;" that under our statute, as well as under the common law, a felonious intention is an essential element of the offense of larceny, and that the omission of the word "feloniously" in an information or indictment charging larceny—grand or petit—is fatal.

The statute defining larceny (J. & A. ¶ 3792) reads as follows: "Larceny is the felonious stealing, taking and carrying, leading, riding, or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the daytime, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner."

The first question for us to determine is, under the practice in this State, in an information charging petit larceny, is it absolutely essential that the intent should be alleged by the use of the word "feloniously"?

Under the common law, an indictment for treason alleged that the act was committed *traitoriously*; for a felony, that it was done *feloniously*, and where neither of these words was used, the offense charged was at most a misdemeanor. The indictment in ancient times was in Latin, and because of the grave punishments meted out to defendants in treason and felony cases it was of great importance to a defendant that the indictment should show on its face, by some apt, precise and well-understood term, the nature of the offense with which he was charged. Bishop on Criminal Procedure (3rd Ed.) p. 335; 1 Chitty's Crim-

inal Law, p. 242. Under the common-law practice the word "feloniously" was absolutely essential in all indictments charging a felony, and it was the settled rule to charge that the offense was committed *feloniously*, and this epithet could not be supplied by any other word, or by any circumlocution. Com Dig. *Indictment* (G. 6); Bac. Abr. *Indictment* (G. 1); 2 Hale, Pl. Cr. 172, 184; 1 Ben. & H. Lead. Cr. Cas. 154. The word "feloniously" was not used in an indictment charging a misdemeanor. Bishop on Criminal Procedure (3rd Ed.) secs. 534-537. In some of the States the rule prevails that if an indictment charges a misdemeanor and the word "feloniously" is used, the indictment is bad, but the prevailing doctrine is that in such a case the word "feloniously" is regarded as surplusage, and the indictment is held to be good. 22 Cyclopedia of Law and Procedure, p. 233; Bishop on Criminal Procedure (3rd Ed.) sec. 537.

Under the common law petit larceny was a felony, but in this State it is made a misdemeanor by statute (Hurd's R. S. 1912, ch. 38, sec. 168, J. & A. ¶ 3793), and in 1911, the legislature removed the offense from the category of infamous crimes. (Hurd's R. S. 1912, ch. 38, sec. 279, J. & A. ¶ 3972.) Before the passage of this last act it was necessary to prosecute defendants charged with petit larceny by indictment. *People v. Russell*, 245 Ill. 268. Such is not the case since the passage of the last-mentioned act. If the common-law rule of pleadings governs the present case, it would seem clear that it is not necessary to use the word "*feloniously*" in an information charging petit larceny.

Our statute gives but one definition of larceny, and as this states that "larceny is the *felonious* stealing," etc., it is argued that the word "felonious" is intended to define the *animus furandi* or the intention to steal, and that to constitute larceny under the statute—petit or grand—the stealing must be done with *felonious*

The People v. Waltyn, 191 Ill. App. 86.

intent, and that this intent must be charged in the information, and that as the information in the present case does not allege a felonious intent, it is fatally defective. For the purposes of this particular case, we may assume the correctness of the contention that a felonious intent is an essential element in the offense of petit larceny. While it is a well-settled doctrine in this State that where a statute defines an offense, no essential element of the offense as defined by the statute can be omitted from the indictment or information, it is not necessary, however, to use in an indictment or information the very words of the statute defining an offense; it is sufficient if the words used convey the same meaning. *People v. St. Clair*, 244 Ill. 444. Therefore, in determining the present contention, it is only necessary for us to decide whether the information in this case sufficiently alleges the *felonious* intent to steal.

The information charges, *inter alia*, that the plaintiff in error "did then and there wrongfully and unlawfully take, *steal* and carry away, contrary to the statute."

In 36 Cyclopaedia of Law and Procedure, p. 1258, we find the following: "Steal or Stealing. As a noun, a criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it; a term which when used in connection with property which is a subject of larceny, is said to mean the felonious taking; the felonious taking and carrying away of the personal goods of another; the wrongful or fraudulent taking and carrying away of personal property by trespass with a felonious intent to deprive the owner thereof, and convert the same to the taker's own use; synonymous with 'larceny' or with 'theft.' As a verb, to take a man's property from his custody with a felonious intent; to commit larceny; to take and carry away feloniously; to take without right or leave, and with intent to keep

wrongfully.” (The author of the above article cites many authorities in support of his text.) Theft is a popular word for larceny; Bouvier’s Law Dictionary, vol. 2, p. 1115. The word “steal” has a uniform signification, and in common as well as legal parlance means the felonious taking and carrying away of the goods of another. *State v. Chambers*, 2 Greene (Ia.) 308; *State v. Boyce*, 65 Ark. 82; *People v. Urquidas*, 96 Cal. 239; *People v. Tomlinson*, 102 Cal. 19. “To steal a man’s property is to take it from his custody with a felonious intent.” *State v. Fitzpatrick*, 9 Houst. (Del.) 385. The word “steal” means to take and carry away feloniously, without right or leave. *State v. Smith*, 31 Wash. 245; *People v. Lopez*, 90 Cal. 569. The word “steal” has a legal signification. To steal is to commit larceny. *State v. Tough*, 12 N. Dak. 425.

Therefore, if we assume that a felonious intent is an essential element in the statutory offense of petit larceny, it would seem clear, from the foregoing authorities, that the word “steal” in the present information sufficiently alleges the felonious intent, for the reason that the word “steal” *ex vi termini* imports a felonious intent.

The defendant in error contends that it is not necessary to allege in an information charging a misdemeanor that the act was committed *feloniously*. In support of this contention it cites the following cases: *State v. Boyce*, *supra*; *Gardner v. State*, 55 N. J. Law 17. In these cases it is held that it is not necessary in cases of petit larceny (even where the statute defines larceny as the *felonious* stealing, etc.) to charge that the taking, stealing, etc., was *feloniously* done, but the decisions are not predicated entirely upon that ground alone, for it is held in both cases that the word “steal” in the indictments in question sufficiently imported a *felonious* taking, etc. Unless it be held that our legislature intended by section 167 (J. & A. ¶ 3792) of the Code (the one that defines larceny) to

make a felonious intent an essential element in both grades of larceny, the prevailing doctrine heretofore referred to in this opinion, a doctrine that is the product of the common-law practice, to the effect that the word "felonious" should not be used in an indictment or information charging a misdemeanor, would seem to apply to the present case. Under the general rule applying to the interpretation of statutes, section 167 should be read in connection with sections 168 and 279, in petit larceny cases, and when the three sections are considered together, there would seem to be much force in the contention of the defendant in error that, under our statute, a felonious intent is an essential element in grand larceny but not in petit larceny. A *larcenous* intent, that is an intent to steal, is clearly an essential element in petit larceny, but a *felonious* intent seems neither a necessary nor an appropriate averment in an indictment or information in a misdemeanor case. However, in the view that we have taken of the contentions of the plaintiff in error, we do not deem it necessary in this case for us to pass upon the contention of the defendant in error.

The judgment of the Municipal Court of Chicago will be affirmed.

Affirmed.

The Pullman Company, Appellee, v. The Vinegar Bend Lumber Company et al., on appeal of Vinegar Bend Lumber Company, Appellant.

Gen. No. 19,993. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed January 5, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Appeal by The Vinegar Bend Lumber Company from a decree requiring it and other defendants in an interpleader suit to interplead. To the original bill appellant filed a sworn answer and served notice thereof on the complainant, and no replication thereto was filed. Later the complainant on leave given filed its amended bill of complaint waiving answers under oath, and issues were formed thereon by the filing of answers and replications, appellant not waiving any rights under said sworn answer.

The pleadings showed that complainant was indebted in the sum of \$1,222.56 for lumber which both appellant and one Joice claimed to have sold to it; that Joice assigned his interest in the money to the Old Colony Trust & Savings Bank; that the latter brought suit therefor against complainant in the name of Joice; that one Brooks, a creditor of appellant, summoned complainant as garnishee in an attachment suit against appellant, in which Joice and the Bank intervened as claimants of the money, and in which was later filed a stipulation by which the several parties, except Brooks, agreed to enter appearance in this interpleader suit, where the issues should be tried.

At the hearing the only proofs adduced were by the complainant, consisting of a transcript of the record of the proceedings in the attachment suit and the answer of complainant as garnishee.

The Pullman Co. v. The Vinegar Bend Lumber Co., 191 Ill. App. 93.

At the close of the case, appellant moved to dismiss the several bills for want of equity, but the motion was denied and the decree requiring defendants to interplead, and a deposit in court of the sum in controversy, was entered, whereupon this appeal followed.

W. KNOX HAYNES and MICHAEL FEINBERG, for appellant.

H. T. WILCOXON, for appellee; WILLIAM BURRY, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. *STIPULATION, § 19*—when pleading may be considered as evidence.* Where a stipulation was entered into contemplating that the title to a fund which was at issue in a garnishment suit, should be submitted for adjudication in an interpleader suit, where a final decree should be entered, in effect each party waived any question as to the sufficiency of the bill and consented to interplead, wherefore one party could not contend that under sec. 29 of the Chancery Practice Act (Hurd's R. S. ch. 22, sec. 29, J. & A. ¶ 909) its sworn answer was to be taken as true.

2. *INTERPLEADER, § 2*—what is nature of suit.* In an interpleader suit the complainant's office is widely different from that of the ordinary complainant in a suit in equity, and the answers of defendants may be read against one another.

3. *INTERPLEADER, § 7*—when pleading sufficient.* In an interpleader suit, where the complainant admitted its indebtedness for certain lumber which two parties claimed to have sold, allegations of one of such parties that the complainant gave a written order for the lumber, that same was shipped to the complainant and that the latter knew it was purchasing the lumber from such interpleader, were mostly conclusions, and the answer did not set up facts showing liability upon an independent undertaking without reference to the liability to the other claimant.

4. *INTERPLEADER, § 14*—what must be shown by answer.* In an interpleader suit, where the original bill showed that the debt or

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Smith v. Rosenwasser, 191 Ill. App. 95.

fund was claimed by several defendants, that complainant was not interested in it and that it emanated from a common source, it was unnecessary to set forth in detail the alleged title of defendants.

5. INTERPLEADER, § 5*—*when bill sufficient*. A bill showing that a fund due for lumber sold was claimed by all of several parties against whom the bill demanded relief, that it had a common source in the lumber or sale thereof, that complainant was not interested therein and was indifferent among the complainants, contained sufficient elements essential to the equitable remedy of interpleader.

6. INTERPLEADER, § 14*—*when cross-bill unnecessary*. A cross-bill is unnecessary for the assertion and adjustment of a claim of one interpleading, the answer being sufficient.

William Sumner Smith, Defendant in Error, v. Harry Rosenwasser et al., trading as Rosenwasser Brothers, Plaintiffs in Error.

Gen. No. 20,109. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 5, 1915.

Statement of the Case.

Attachment suit by William Sumner Smith against Harry Rosenwasser and Morris Rosenwasser, copartners, trading as Rosenwasser Brothers, in New York City, the plaintiff claiming that they owed him \$156.96. Tucker & Hagen, a corporation, was served as garnishee. Subsequently the defendants appeared and entered into a recognizance, whereupon the attachment was released. Plaintiff's claim was based upon the refusal of defendants to deliver him certain sandals, resulting in a loss of profits because of his inability to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Smith v. Rosenwasser, 191 Ill. App. 95.

resell the sandals. It appeared that the defendants refused to deliver the goods unless the plaintiff paid cash or procured somebody to guarantee his account for him, though they had contracted to allow him a certain time for payment. The case was tried before the court without a jury, resulting in a judgment against defendants for \$156.96, whereupon this writ of error was brought.

CULVER, ANDREWS & KING, for plaintiffs in error.

WILLIS MELVILLE, for defendant in error; ERNEST C. RENIFF, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 381*—*when buyer bound to reduce damages.* Where a seller breached a contract whereby sandals were to be delivered to a purchaser, but the purchaser was notified of the refusal to deliver the goods unless he paid cash or obtained somebody to guarantee his account, and such purchaser could have obtained similar sandals and reduced his damages, it was the duty of such purchaser to so reduce his damages, and only nominal damages were recoverable.

2. SALES, § 376*—*what measure of damages for breach of contract.* In an action for breach of contract in failing to deliver chattels or other commodities, where the purchase price has not been paid, the measure of damages is the difference between the contract price and the market value of the property at the time stipulated for delivery.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**City of Chicago, Plaintiff in Error, v. James Cullen,
Defendant in Error.****Gen. No. 20,133.**

1. **APPEAL AND ERROR, § 782***—*what is nature of bill of exceptions.* A bill of exceptions is the pleading of the party presenting it, and to authorize a reversal of the judgment, prejudicial error must be shown to have occurred at the trial.

2. **APPEAL AND ERROR, § 1265***—*what will be presumed on appeal.* In cases at law the presumption is in favor of the correctness of the trial court's rulings unless their incorrectness is made to affirmatively appear.

3. **APPEAL AND ERROR, § 1034***—*when Appellate Court will not take judicial notice of ordinance.* Section 54 of the Municipal Court Act as amended in 1907 (Hurd's R. S. ch. 37, sec. 317, J. & A. ¶ 3371), providing that the Municipal Court shall take judicial notice of all general ordinances of the City of Chicago, relates to the procedure of the Municipal Court and does not require the Appellate Court to take judicial notice of such ordinances, and such practice would destroy uniformity in the procedure of the Appellate Court, since under established rules of practice the court could not take judicial notice of such ordinances in cases taken up from the Circuit or Superior Courts.

4. **APPEAL AND ERROR, § 1034***—*what Appellate Court does not take judicial notice of.* The Appellate Court cannot take judicial notice of the rules of the Municipal Court.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADSWORTH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 5, 1915.

WILLIAM H. SEXTON and JAMES S. McINERNEY, for plaintiff in error; ULYSSES S. SCHWARTZ, of counsel.

No appearance for defendant in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Cullen, 191 Ill. App. 97.

On May 16, 1913, the plaintiff, City of Chicago, filed the following statement of claim in the Municipal Court of Chicago:

"Plaintiff's claim is for a penalty not exceeding \$100 for a violation by defendant of section 1541 of the Chicago Code of 1911, in that the defendant did, on to-wit, the 1st day of January, 1913, keep open a certain saloon, barroom or tippling house, at to-wit, 344 E. 31st street, within the said city, during the nighttime, between the hours of one o'clock A. M. and five o'clock A. M., and did within the said place sell intoxicating liquors between the said hours."

The defendant, James Cullen, entered his appearance and waived a trial by jury, and on August 7, 1913, the cause was tried before the court, resulting in the court finding the defendant not guilty and entering a judgment on the finding.

From the stenographic report of the proceedings at the trial, certified by the trial judge as being correct, it appears that two witnesses on behalf of the City each testified, in substance, that they went into the saloon or barroom at No. 339 East 31st street in the City of Chicago, and there purchased beer of the bartender at 1:45 A. M. on the morning of January 1, 1913. The defendant testified, in substance, that his saloon on the morning in question was located at No. 341 East 31st street; that his cafe was located at No. 339 East 31st street; that at one o'clock on said morning he personally locked the doors of his saloon and closed the saloon and bar, and that he "closed up the cafe at two o'clock or a little after." In said stenographic report it is stated that the above "is all the evidence offered or heard on the hearing of the above entitled cause."

It is here urged by counsel for the City that the judgment should be reversed because the finding and judgment are against the weight of the evidence, in that it clearly appears that the defendant was guilty of

a violation of said section 1541 of the Chicago Code of 1911.

Nowhere in the stenographic report is it shown what the provisions of said section of said Code are. "A bill of exceptions is the pleading of the party presenting it, and to authorize a reversal of the judgment prejudicial error must be shown to have occurred at the trial. In cases at law the presumption is in favor of the correctness of the trial court's rulings unless their incorrectness is made to affirmatively appear." *Kiesewetter v. Knights of Maccabees*, 227 Ill. 48, 52; *People v. Drainage District No. 3*, 235 Ill. 278, 280. Section 54 of the Municipal Court Act, as amended in 1907 (J. & A. ¶ 3371), provides, *inter alia*, that the Municipal Court shall take judicial notice of "all general ordinances of the City of Chicago." In *City of Chicago v. Williams*, 254 Ill. 360, 365, it was held that said section relates to the procedure of the *Municipal Court*; and it was said that "the fact that the statute in question does not require the *appellate* tribunal to take judicial notice of the ordinance is no reason why the act is invalid *as applied to the municipal court*"; and it was further said, it being conceded in that case that there was an ordinance of the City prohibiting the offense charged against Williams and that Williams violated said ordinance: "We have no occasion to examine the ordinance, and hence there is no necessity for us to determine whether we would judicially take notice of it or whether it would have to be brought to our attention by some other method." In the record before us in the present case it does not appear to be conceded that section 1541 of said Chicago Code prohibits the acts charged in the statement of claim to have been done by the defendant, or that the defendant violated said section of said Code. And, in our opinion, this appellate court cannot take judicial notice of what the provisions of said section are. *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 315; *City of Chicago v. Tearney*, 187 Ill. App. 441. And, said section not ap-

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pearing in the stenographic report, we cannot say, even admitting for the sake of the argument only that the facts as stated by plaintiff's witnesses were true, that the defendant was guilty of any offense, or that the trial court committed an error in entering the judgment.

It is the law that this court cannot take judicial notice of the rules of practice of the Circuit or Superior Courts of Cook county. *Anderson v. McCormick*, 129 Ill. 308, 314; *Bonney v. McClelland*, 138 Ill. App. 449, 454. Section 20 of the Municipal Court Act, as amended in 1907 (J. & A. ¶ 3332), contained the provision that the Supreme Court and this court, in cases brought to them from the Municipal Court by appeal or by writ of error, shall take judicial notice of the rules of practice from time to time in force in said Municipal Court. But our Supreme Court, in the case of *Sixby v. Chicago City Ry. Co.*, 260 Ill. 478, has held that, by reason of the provisions of section 29 of article VI of the Constitution, said section 20 is void, and that, inasmuch as this appellate court, in all cases coming from any court except the Municipal Court, cannot under established rules of practice take judicial notice of the rules of the trial court, to allow this court to take judicial notice of the rules of the Municipal Court would destroy uniformity in the procedure and practice in this court.

If it be argued that when a judgment of a *nisi prius* court is presented to an appellate tribunal for review, such appellate tribunal should take judicial notice of all things of which said *nisi prius* court is required to take judicial notice (*Fisher v. Charles Levy Circulating Co.*, 182 Ill. App. 393, 399, decided prior to the filing of the opinion in the *Sixby* case, *supra*), we think it is a sufficient answer to say that, inasmuch as under established rules of practice this court cannot take judicial notice of ordinances of the City of Chicago in cases coming to this court from the Circuit and Su-

Enberg v. City of Chicago, 191 Ill. App. 101.

perior Courts, to allow this court to take judicial notice of such ordinances in cases coming from the Municipal Court would also destroy uniformity in the procedure and practice in this court.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

Affirmed.

**Charles Enberg, Plaintiff in Error, v. City of Chicago,
Defendant in Error.**

Gen. No. 20,145.

MUNICIPAL CORPORATIONS, § 1234*—*when notice of suit must be alleged.* Where a statement of claim in a fourth-class suit commenced in the Municipal Court against a city to recover for personal injuries fails to allege the giving of notice of the accident to the city as required by section 2 of the Act of 1905 (Hurd's St. 1912, p. 1290, ch. 70, J. & A. ¶ 6190) it is defective, and an amended statement alleging the giving of such notice but filed more than one year after the accident is open to the plea of the statute of limitations.

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 5, 1915. Rehearing denied January 16, 1915.

JOHN E. ERIKSON, for plaintiff in error.

WILLIAM H. SEXTON and N. L. PIOTROWSKI, for defendant in error; DAVID R. LEVY, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

On November 27, 1912, Charles Enberg, plaintiff, commenced an action of the fourth class in tort in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Enberg v. City of Chicago, 191 Ill. App. 101.

Municipal Court of Chicago against the City of Chicago. In his statement of claim plaintiff alleged, in substance, that his claim was for damages on account of personal injuries sustained by him on June 24, 1912, at Kinzie street and the river in said City, as a result of the negligence of the bridge tenders and servants of the defendant in lifting or raising the bridge, crossing the river at said Kinzie street, while plaintiff was upon and crossing said bridge, whereby he sustained a fall from the bridge and was severely injured, etc.

In 1905 the legislature passed an act entitled "An Act concerning suits at law for personal injuries and against cities, villages and towns." Hurd's St. 1912, p. 1290, ch. 70. (J. & A. ¶¶ 6189 *et seq.*) Section 1 of said act provides, in substance, that no such suit at law shall be brought in any court within this state by any person unless the same be commenced "within one year from the time such injury was received or the cause of action accrued." Section 2 provides, in substance, that any person, about to bring any such suit at law in any court, shall, within six months from the date of injury or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney, if there is a city attorney, and also in the office of the city clerk, a statement in writing, giving certain particulars, mentioned in the section, of the accident. Section 3 provides, in substance, that if the "notice" provided for by section 2 be not filed as provided, then any such suit "shall be dismissed and the person to whom any such cause of action accrued for any personal injury should be forever barred from further suing."

Plaintiff's said statement of claim did not contain any allegation to the effect that notice, as provided in section 2 of said act, had been given to the City. On October 15, 1913, more than one year after the happening of the accident as alleged, plaintiff, by leave of court, filed an amended statement of claim, containing

substantially the same allegations as the original statement and the additional allegation that "notice of the said accident and injuries was served upon the defendant, as required by statute, on to-wit, the 15th day of August, A. D. 1912."

To this amended statement of claim the City filed an affidavit of merits in which it was stated, *inter alia*, that the City was not liable because plaintiff's amended statement of claim alleges a new cause of action and is subject to the statute of limitations, etc.

It appears from the statement of facts, signed by the judge and contained in the clerk's transcript, that on December 6, 1913, the parties appeared by their respective counsel, and counsel for the City moved the court to dismiss the cause, stating that he had previously notified plaintiff's counsel that upon the hearing he would raise the objection, as stated in the affidavit of merits, that plaintiff's amended statement of claim alleged a new cause of action and was barred by the statute of limitations; that plaintiff's counsel had requested him to raise said objections before the trial; and that both parties had agreed that said objections be then considered by the court and decided. Thereupon argument was had, and on December 8, 1913, the court stated that the motion of the City would be allowed, and that for the purpose of having the record in proper shape for an appeal the following order would be entered, to wit: "Plaintiff demurs to defendant's plea of the statute of limitations. Plaintiff's demurrer overruled. Plaintiff elects to stand by his demurrer. Motion of plaintiff in arrest of judgment for costs against the plaintiff overruled. Judgment against plaintiff for costs." It further appears from the clerk's transcript that on December 8, 1913, the following proceedings were had: "Now comes the defendant in this cause and moves the court to dismiss this suit out of this court, which motion the court sustains."

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It is here assigned as error that the court erred in overruling plaintiff's demurrer to defendant's plea of the statute of limitations, and in dismissing the suit and entering judgment against plaintiff for costs. It is argued that because this is a fourth-class suit commenced in the Municipal Court and because of the provisions of sections 3 and 40 of the Municipal Court Act (J. & A. ¶¶ 3315, 3352), the decision in the case of *Walters v. City of Ottawa*, 240 Ill. 259, is not applicable. In that case the declaration in a personal injury suit, commenced in the Circuit Court of La Salle county against the City of Ottawa, failed to aver that the notice or statement required by section 2 of said act of 1905 was given as therein required, and it was held that such declaration stated no cause of action, and that an amendment to the declaration, supplying such averment, filed more than one year after the injury, was open to the plea of the statute of limitations. In the present case plaintiff's original statement of claim did not contain such an averment as to such a notice, and his amended statement of claim supplied the missing averment, but the amended statement was not filed until more than one year after the happening of the accident and when plaintiff received the injuries complained of. We are of the opinion that the same rule should be applied in the present case. As said by this court in *Devine v. Metropolitan West Side El. Ry. Co.*, 162 Ill. App. 629, 632: "We are not prepared to hold that it is not necessary that the statement of claim, filed in the Municipal Court in cases of the fourth class, should state a cause of action. Nothing in the Municipal Court Act justifies the assumption that it was intended to abolish the necessity of stating a cause of action in this class of cases."

The judgment of the Municipal Court of Chicago is affirmed.

Affirmed.

**J. M. Hoyt, Defendant in Error, v. Earl J. Walker,
Plaintiff in Error.**

Gen. No. 20,171. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAV-
ERLY, Judge, presiding. Heard in the Branch Appellate Court at
the March term, 1914. Affirmed. Opinion filed January 5, 1915.

Statement of the Case.

Action of the fourth class in the Municipal Court
of Chicago by J. M. Hoyt against Earl J. Walker to
recover of him as indorser the balance due on the fol-
lowing promissory note:

“CHICAGO, Nov. 1st, 1911.

On demand after date we promise to pay to the order
of J. M. Hoyt (\$1,000) one thousand and no/100 dol-
lars, payable at _____, value received with interest
at the rate of 6 per cent per annum. Four days’
notice agreed upon.

INDUSTRIAL & HISTORICAL PAGEANT CORPORATION,

By Laurence Clark, Pres.”

The note was indorsed by “Laurence Clark,” “H.
H. Hoyt, Jr.,” “Earl J. Walker,” and also had the
following indorsement: “Jan. 11/12, \$120 paid on
principal, J. M. H.” The cause was tried before the
court without a jury, resulting in the court finding the
issues against the defendant and assessing plaintiff’s
damages at \$986.29. Judgment against defendant
was entered on the finding, from which judgment de-
fendant brought error.

MILLER, STARR, PACKARD & PECKHAM, for plaintiff in
error; CHARLES L. COBB, of counsel..

EUGENE L. GAREY and ARCHIE J. DEUTSCHMAN, for
defendant in error; FRANK D. FULTON and JOHN M.
RANKIN, of counsel.

Colburn et al. v. Commercial Security Co., 191 Ill. App. 106.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1401*—*when finding supported by evidence.* In an action against an indorser on a promissory note, held that the finding and judgment against such indorser was amply supported by the evidence, there being proper presentment and demand for payment on the maker and notice of dishonor to the indorser, and the evidence did not show a material alteration of such note by adding words as to certain days of notice after the note was indorsed.

Warren E. Colburn and Fletcher A. Tinkham, trading as W. E. Colburn & Company, Defendants in Error,
v. Commercial Security Company, Plaintiff in Error.

Gen. No. 20,195. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 5, 1915.

Statement of the Case.

Action in tort in the Municipal Court of Chicago by Warren E. Colburn and Fletcher A. Tinkham, trading as W. E. Colburn & Company, and carrying on the Merchants Exchange Bank, against the Commercial Security Company, a corporation, to recover \$120 of the defendant and also to recover other amounts aggregating the sum of \$45. The cause was tried before the court without a jury. At the conclusion of the hearing the court announced that the plaintiffs were not entitled to recover any of the amounts aggregating

*See Illinois Notes Digest, Vols. XI to XV. and Cumulative Quarterly, same topic and section number.

Colburn et al. v. Commercial Security Co., 191 Ill. App. 106.

\$45, but as to the amount of \$120 found the defendant guilty as charged in plaintiff's statement of claim. Judgment was entered on the finding and defendant brought error.

Reference should also be had to the case of *Colburn v. Commercial Security Co.*, 172 Ill. App. 510, where the parties were the same.

JOHN T. BOOZ, for plaintiff in error.

H. M. MATTHEWS, for defendants in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1403*—*what sufficient to support finding.* Where a statement of claim was for money collected by the defendant with notice of the plaintiff's right thereto under a conditional contract of sale of a piano, and the defendant's affidavit of merits admitted the collection, and alleged that the plaintiff elected to sue in trover for the then value of the contract, and obtained a judgment therefor which was paid, and such affidavit only made an issue of law that the plaintiffs were estopped from claiming the \$120, and such theory was further evidenced by admissions in open court by the counsel for defendant, the admissions were sufficient to support a finding and judgment against the defendant, though no other evidence was introduced at the trial.

2. ELECTION OF REMEDIES, § 13*—*when suit not barred.* In an action to recover money collected by a defendant with notice of the plaintiffs' right thereto under a conditional contract of sale of a piano, plaintiffs were not estopped from bringing their action by the fact that a prior action in replevin for the possession of the contract had been brought, and because plaintiff afterwards elected to proceed in trover for the value of the contract, since when plaintiffs commenced their action in replevin they could not have sued for the undesignated money paid on the contract, and since, under the facts, a separate right of action existed as to such money.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lina Walper et al., Plaintiffs in Error, v. Andrew Malkewicz, Defendant in Error.

Gen. No. 20,214. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and judgment here with finding of facts. Opinion filed January 5, 1915.

Statement of the Case.

Action of the fourth class in the Municipal Court of Chicago by Lina Walper, John Walper and Rudolph Walper, heirs of Jacob Walper, deceased, against Andrew Malkewicz on a written lease. It appeared that certain premises were leased for three years to the defendant, at a total rental of \$936, payable monthly in advance at the rate of \$26 per month, and that during the last year the defendant moved away from the premises and failed to pay eight months' rent. The defendant contended that the lease was cancelled and terminated. The case was tried before the court without a jury resulting in a judgment in favor of the defendant, whereupon the plaintiffs brought this writ of error.

JOHN B. FREUCHTL, for plaintiffs in error.

FRANK H. NOVAK, for defendant in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 453*—*what sufficient to show surrender of premises.* The fact that repairs are made by a lessor

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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after a lessee has moved away from the premises is not sufficient as an acceptance of the premises and a surrender.

2. LANDLORD AND TENANT, § 301*—*when landlord entitled to rent.* Where evidence showed the signing of a written lease, that the lessee moved away from the premises and failed to pay rental for the last eight months of his term, and the evidence failed to show that the lease was cancelled, the lessor was entitled to recover the rental due under the lease.

Morris Friedland, Defendant in Error, v. Samuel Isenstein, Plaintiff in Error.

Gen. No. 20,227.

1. BROKER, § 36*—*when broker entitled to compensation.* Evidence held to show that a person employed a real estate broker to sell certain property, that such broker in good faith undertook the employment and was the procuring cause of the sale, though not present when it was consummated, wherefore he was entitled to commissions.

2. BROKERS, § 5*—*when license necessary.* If an ordinance declares it to be unlawful for a person to act as a broker without a license, and prescribes a penalty for its violation, an unlicensed broker cannot recover commissions, even though the ordinance does not declare the contract of employment void.

3. BROKERS, § 5*—*when license sufficient.* Where a broker's license is issued to a partnership, and one of the partners succeeds to the business of the partnership upon dissolution of the firm and continues business individually at the same location, he is to be considered a licensed broker.

Error to the Municipal Court of Chicago; the Hon. JOSEPH SATH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 5, 1915. Rehearing denied January 16, 1915.

GUSTAV E. BEERLY, for plaintiff in error; LEWIS BINAKER and ROY S. GASKILL, of counsel.

ROMAN G. LEWIS, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Morris Friedland, plaintiff, on January 19, 1914, recovered a judgment for \$1,000 against Samuel Isenstein, defendant, in the Municipal Court of Chicago, for commissions as a real estate broker. The defendant by this writ of error seeks to reverse the judgment. The cause was tried before the court without a jury.

The plaintiff in his statement of claim alleged in substance that, being a licensed real estate broker, he procured one B. Weinstein as a purchaser for defendant's property, situate at Nos. 3254-60 W. Madison street, Chicago, and that said property was sold to said Weinstein for a consideration of \$40,000, and that he claimed a commission of \$1,000, no part of which sum had been paid him. The defendant in his affidavit of merits alleged, in substance, that plaintiff was not the procuring cause of said sale, and that at the time the sale was made, in July, 1913, plaintiff was not a duly licensed real estate broker under the provisions of sections 192-198 of chapter 15 of the Revised Municipal Code of Chicago, and that defendant was not indebted to plaintiff in any sum.

On the trial, it was not disputed that in July, 1913, the defendant sold the property to Weinstein and received therefor, in cash and another piece of real estate, the equivalent of \$40,000, but the evidence was conflicting as to whether or not plaintiff was the procuring cause of the sale. Plaintiff testified, in substance, that during the year 1913 he was in business as a real estate broker, with offices at No. 613 Ashland Block, Chicago, and was also an attorney at law; that prior to March 1, 1913, defendant listed with plaintiff several pieces of real estate for sale, including the property in question on West Madison street; that early in March plaintiff submitted the property in question to said Weinstein who expressed a willingness to consider purchasing same on a basis of part

cash and exchanging a smaller piece of property owned by him; that plaintiff shortly thereafter asked defendant to call at his office, which the latter did, and plaintiff told defendant of his conversation with Weinstein, and requested defendant to at once go with one Weinshenker and look at the smaller piece of property, owned by Weinstein, which Weinstein had suggested exchanging. Weinshenker testified that he was present in plaintiff's office at the time, and that he and defendant immediately went and viewed said Weinstein property. Plaintiff further testified that he saw defendant at the latter's house on the same evening and they talked over terms of the proposed transfer, and that defendant told plaintiff he would get \$1,000 as soon as the deal was completed; that shortly thereafter plaintiff again called on Weinstein and informed him of the terms on which defendant had said he was willing to make the trade; that on March 10th he sent defendant a registered letter (copy of letter and original registry receipt were introduced in evidence) advising defendant that he had submitted defendant's property to Weinstein and was negotiating with him; that subsequently he continued his negotiations; and that later, in July, 1913, he learned that the deal had been consummated between the parties when he was not present. The defendant, while he admitted that he talked with plaintiff early in March regarding the sale of the property in question and that plaintiff came to his house occasionally during the months of May and June, testified to the effect that one Goldberg, a real estate broker, was the procuring cause of the sale and that he paid Goldberg a commission. He denied ever having agreed to pay plaintiff a commission of \$1,000 when the deal was completed. He admitted being in plaintiff's office early in March and going with Weinshenker to view certain property but stated that the property they looked at was not the Weinstein property, afterwards transferred to him in the consumma-

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tion of the deal, but was another piece of property. Goldberg, a witness for defendant, testified that he first spoke to Weinstein about the Isenstein property in April, 1913 (which was subsequent to the time that plaintiff first presented the same to Weinstein), and that after the deal was consummated he received a commission of \$300 from defendant, and also a further commission of \$200 for subsequently selling for defendant the property received from Weinstein when the deal in question was consummated. Weinstein, a witness for defendant, testified that he first looked at the Isenstein property shortly after plaintiff first spoke to him about the same.

After careful examination of the testimony of the various witnesses, we cannot agree with the first contention of counsel for defendant, viz., that the finding and judgment are manifestly against the weight of the evidence. On the contrary we think that the evidence tends to show that the defendant employed the plaintiff to negotiate a sale of defendant's property valued at \$40,000, that plaintiff in good faith undertook said employment and was instrumental in bringing defendant and Weinstein together, whereby the sale to Weinstein was afterwards made, and that, although plaintiff was not present when the sale was actually consummated, he was nevertheless the procuring cause of the sale. Under all the circumstances we think that he is entitled to the commissions claimed. *Hafner v. Heron*, 165 Ill. 242; *Henry v. Stewart*, 185 Ill. 448, 453; *Pridmore v. Wilson*, 159 Ill. App. 343, 346; *Gould v. Ricard Boiler & Engine Co.*, 136 Ill. App. 322, 331.

It is further urged by counsel for defendant that plaintiff cannot recover because he, individually, was not a duly licensed real estate broker during the year 1913, and at the times when the sale was being negotiated and when consummated. During the trial sections 192 to 198 inclusive, of chapter 15, of the Chicago Code of 1911, were introduced in evidence. Section

192 provides that it shall be unlawful for "any person or corporation" to engage in the business or act in the capacity of a broker, within the city, without first obtaining a license therefor, and that the written application for such license shall state "the name of the person or corporation and the location of the place or places of business for which such license is desired." Section 193 provides that if, after the issuance and delivery of a license, "any change shall be made in the place or places of business covered thereby no business shall be carried on in such new location until a notice shall have been given in writing to the city collector." Section 195 defines a real estate broker as "one who is engaged for others in negotiating contracts relative to real estate." Section 197 provides that any person "employed by a person or corporation licensed as a broker, who shall himself engage in the business or act in the capacity of a broker," shall be required to take out a license. Section 198 provides for a penalty by fine for "any person or corporation violating any of the provisions of this chapter." There was also introduced in evidence a license of the city of Chicago, signed by the mayor and attested by the city clerk, dated January 2, 1913, and expiring December 31, 1913, by which "permission is hereby given *Fox & Friedland* to conduct the business of General Broker at No. 613 Ashland Blk., in said City, * * * subject to the Ordinances of said City." The evidence also showed that plaintiff, during January, 1913, and prior thereto, was in partnership with a man named Fox, under the firm name of Fox & Friedland; that the firm was engaged in business as brokers, with offices at No. 613 Ashland Block, Chicago; that said copartnership was dissolved on February 1, 1913, and that thereafter plaintiff alone continued said brokerage business at the same place; and that after said dissolution plaintiff obtained no other license during the year 1913, but continued to act as a real estate broker under said

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license so issued to said firm. It is the law that if a statute or ordinance declares it to be unlawful for a person to act as a broker without a license and prescribes a penalty for its violation, an unlicensed broker cannot recover upon the contract for commissions, even though the statute or ordinance does not, in terms, declare the contract void. *Douthart v. Congdon*, 197 Ill. 349, 353.

It is contended by counsel for defendant that where a broker's license is issued, under the provisions of said chapter 15 of the Chicago Code of 1911, to a partnership in the firm name for the conducting of a brokerage business at a particular place, and one of the partners succeeds to the business of the partnership upon dissolution of the firm and continues that business individually at the same location, but does not take out a new license in his individual name, the latter cannot recover commissions for services rendered as broker after said dissolution and before the expiration of said license so issued to said firm. We are of the opinion that under such circumstances such broker is to be considered as a licensed broker under the provisions of said Chicago Code of 1911. Our attention has not been directed by counsel to any Illinois case where the question has been considered. In the case of *City of St. Charles v. Hackman*, 133 Mo. 634, it appeared that the ordinance of the City of St. Charles provided that: "No person, firm, corporation or association of persons" shall open or keep a meat shop or market place in said city without having first obtained a license, for which the sum of \$50 per year shall be paid; that any "person" violating the provisions of the section shall be deemed guilty of a misdemeanor and upon conviction shall be fined; and that every such license shall contain the name of the "person" in whose favor it is issued, and "shall designate the location where the business is to be carried on, which location shall not be changed without the consent of the

mayor endorsed on such license, but such license shall not be transferable or used for the benefit of any person other than the one to whom it shall have been issued." It further appeared that a license to keep a meat shop for one year at a location named was issued on June 6, 1892, to Langstadt & Hackman, who then were copartners; that on August 19 Langstadt retired and the partnership was dissolved; that Hackman then carried on the meat shop at the same place until June 6, 1893, without taking out a new license in his own name, and that action was brought against him for an alleged breach of the ordinance. The court *held* that the firm license was a sufficient license for Hackman to conduct the business at the same location after said dissolution, saying (p. 643): "Looking at the purpose of the tax and the terms of this ordinance it would seem that a license to two persons to carry on a certain business for a year at a certain place should naturally be interpreted to include the right of one of them to so carry on that business. A license to a firm of two would ordinarily be understood to be a license to one of the firm, on the general principle that the greater includes the less." See also *United States v. Glab*, 99 U. S. 225; *Spielman v. State of Maryland*, 27 Md. 520; *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38; *United States v. Davis*, 37 Fed. 468.

The judgment of the Municipal Court is affirmed.

Affirmed.

Holec et al. v. Beranek, 191 Ill. App. 116.

James Holec and Frank Holec, trading as Holec Brothers, Plaintiffs in Error, v. Kate Beranek, Defendant in Error.

Gen. No. 19,529. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Reversed and remanded. Opinion filed January 5, 1915.

Statement of the Case.

Action by James Holec and Frank Holec, trading as Holec Brothers, against Kate Beranek to recover \$486.87. The action was on a written contract wherein the plaintiffs, for \$1,070, agreed to furnish labor and material and to erect mason work for a certain building, the plans being furnished by architects employed by the defendant. The plaintiff's claim was for \$300, being a balance due on the contract, and \$190.03 for extra work. The case was tried before the court without a jury and the issues were found in favor of the defendant, whereupon the plaintiffs brought error.

CHARLES J. MICHAL, for plaintiffs in error.

F. J. KARASEK, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

ASSUMPSIT, ACTION OF, § 93—when person entitled to recovery for labor performed.* In an action for labor and material in erecting mason work for a building, *held* that recovery should have been allowed for extra work and for a portion of a balance due on the contract which was substantially performed, and a finding and judgment in favor of the defendant was contrary to the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gladys Linn, Defendant in Error, v. United Brotherhood of Carpenters and Joiners of America, Plaintiff in Error.

Gen. No. 20,152. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH SABBATH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 5, 1915.

Statement of the Case.

Action by Gladys Linn against the United Brotherhood of Carpenters and Joiners of America to recover a funeral donation or benefit of two hundred dollars, plaintiff being the widow of Robert Linn, who was a member of defendant Brotherhood. Defendant claimed that the death of Linn was caused by intemperance or his own improper conduct; that he died of *delirium tremens* and that under the constitution of the Brotherhood he was not entitled to any funds. The case was tried before the court with a jury and a verdict was returned in favor of plaintiff for two hundred dollars, upon which judgment was entered, whereupon the defendant brought error.

FRANK FOSTER, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

INSURANCE, § 788*—*when use of intoxicants precludes recovery.* In an action to recover a funeral benefit, held that the greater preponderance of evidence showed that the plaintiff's intestate died from the effects of the excessive use of alcoholic liquors, and under the constitution of defendant's society, plaintiff was not entitled to benefits, wherefore a verdict in favor of the plaintiff was manifestly wrong.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Crescent Fuel Co. v. Bernstein et al., 191 Ill. App. 113.

Crescent Fuel Company, Defendant in Error, v. David Bernstein and Lena Bernstein, Plaintiffs in Error.

Gen. No. 20,180. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 5, 1915.

Statement of the Case.

Suit by Crescent Fuel Company against David Bernstein and Lena Bernstein to recover for coal sold and delivered. The case was tried before the court without a jury and plaintiff recovered a judgment of \$120.20, whereupon the defendants brought error.

AARON SOBLE, for plaintiffs in error.

DEMING & JARRETT, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

JUDGMENT, § 190*—*when judgment against coparty erroneous.* In an action for goods sold and delivered, a judgment against two defendants is erroneous where there was no evidence showing the indebtedness of one of such defendants.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ed. V. Price & Co. v. St. Louis S. W. Ry. Co., 191 Ill. App. 119.

Ed. V. Price & Company, Appellant, v. St. Louis Southwestern Railway Company, Appellee.**Gen. No. 20,202. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 5, 1915. Rehearing denied January 16, 1915.

Statement of the Case.

Action by Ed. V. Price & Company, a corporation, against St. Louis Southwestern Railway Company, a corporation, to recover the value of a trunk of samples of clothes. It appeared that J. R. Bowman was a traveling salesman for the plaintiff and that he delivered the trunk to defendant for shipment to Chicago, at Onalaska, Arkansas, and that the goods were never received by the plaintiff. A judgment was rendered for the defendant and the plaintiff appealed.

GANN, PEAKS & TOWNLEY, for appellant.

JEFFERY & CAMPBELL, for appellee; HERBERT J. CAMPBELL, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

CARRIERS, § 93*—*what evidence improper to show shipment.* In an action against a carrier for failure to deliver a trunk, evidence of a witness that he had investigated the records of defendant and found no entries of the shipment was inadmissible as it did not answer the testimony of the plaintiff or tend to answer it, it appearing that defendant's negative evidence referred to other dates than that on which the plaintiff shipped the trunk.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

DeVoney et al. v. Cooper, 191 Ill. App. 120.

**John B. DeVoney and Otto Price, Defendants in Error,
v. Howard Cooper, Plaintiff in Error.**

Gen. No. 20,216. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 5, 1915.

Statement of the Case.

Action in forcible detainer by John B. DeVoney and Otto Price against Howard Cooper for the possession of a third floor flat leased to the defendant for a period of two years at a rental payable in monthly instalments of twenty dollars each. At the trial a verdict was rendered in favor of the plaintiffs, a motion for new trial was denied and judgment was rendered on the verdict, whereupon defendant brought error.

WALTER J. MILLER and WALTER L. WENGER, for plaintiff in error.

I. B. PERLMAN, for defendants in error; M. A. MILKEWITCH, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

LANDLORD AND TENANT, § 73*—*what agreement does not modify lease.* In an action of forcible detainer, evidence that the lessor entered into an agreement with the lessee whereby the latter, in consideration of being deprived of part of his premises, was to occupy such premises without paying rent while certain alterations were being made was erroneously excluded, since such agreement was not a modification of the lease.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**George Ehrat, trading as George Ehrat & Company,
Plaintiff in Error, v. V. Marrone and R. Lofaro,
trading as Marrone & Lofaro, Defendants in Error.**

Gen. No. 20,243. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 5, 1915.

Statement of the Case.

Suit by George Ehrat, trading as George Ehrat & Company, against V. Marrone and R. Lofaro, trading as Marrone and Lofaro, and their attorneys, Edward L. England and Elbert C. Ferguson, to restrain the prosecution of a suit in the Municipal Court brought by Marrone and Lofaro against the complainant.

The complainant alleged that Marrone and Lofaro were insolvent and were nonresidents, and set up a claim against them in excess of the claim of said Marrone and Lofaro. An injunction was recommended by a master in chancery and entered, and the defendants move to dissolve the injunction. Pending a decision on the motion the defendants filed a general and special demurrer to the bill. Such demurrer was sustained, the injunction dissolved and the bill dismissed for want of equity, whereupon the plaintiff brought error.

EDWARD J. KELLEY, for plaintiff in error.

JOHN C. BURCHARD, for defendants in error Elbert C. Ferguson and Edward L. England.

MR. JUSTICE SMITH delivered the opinion of the court.

Ehrat v. Marrone et al., 191 Ill. App. 121.

Abstract of the Decision.

1. INJUNCTION, § 177*—*when bill shows offer to do equity.* A bill to restrain the collection of a demand by a suit, alleging that the defendants are nonresidents and are insolvent, is not demurrable on the ground that the complainant does not offer to do equity when such complainant sets up a claim in excess of any amount due the defendants.

2. INJUNCTION, § 177*—*when bill not demurrable.* A bill to restrain a suit to collect a certain demand, and setting up a claim in excess of that of the defendants, *held* not demurrable in failing to allege that the loss sustained by the complainant was due to defendants' negligence, it appearing that such loss was due to a failure to insure goods as instructed by the complainant when shipped.

3. INJUNCTION, § 174*—*who are proper parties.* In a suit to restrain certain defendants from prosecuting an action to collect a claim, on the ground that they were nonresidents and insolvent, the attorneys for such defendants were proper parties.

4. SET-OFF AND RECOUPMENT, § 1*—*when court of equity may cause set-off.* A court of equity may under special circumstances, interfere and cause a set-off where a court of law can afford no relief.

5. INJUNCTION, § 194*—*what are requisites of bill.* Insolvency is a distinct equitable ground of set-off, and in a bill to enjoin the collection of a debt by nonresidents who are insolvent, setting up a claim in excess of that sought to be collected by such nonresidents, it is not necessary to allege that the individual members of defendant firm are insolvent.

6. INJUNCTION, § 194*—*when bill for set-off need not show liquidated demand.* In a suit to enjoin the prosecution of an action to collect a debt by nonresidents and setting up a claim in excess of that sought to be collected by such nonresidents, it is not necessary that the complainant's demand should be liquidated by a judgment, when the insolvency of the defendants is admitted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

S. F. Svenson and Harold M. Swensen, Defendants in Error, v. Lucy Roth and Paulina Hockstadter, Plaintiffs in Error.

Gen. No. 18,566. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in this court at the October term, 1912. Affirmed. Opinion filed January 25, 1915. Rehearing denied February 8, 1915.

Statement of the Case.

Action by S. F. Svenson and Harold M. Swensen against Lucy Roth and Paulina Hockstadter to recover balance due on contract for the painting and interior furnishing of a house.

To reverse a judgment for plaintiffs, defendants prosecute error.

HENRY ROTH, for plaintiffs in error.

MONROE FULKERSON, for defendants in error.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL COURT OF CHICAGO, § 26*—*when transcript of record insufficient.* Where, on a writ of error to the Municipal Court of Chicago, the transcript of the record which was filed in sections, does not disclose the contents of the statement of claim and does not contain the matter necessary for the Appellate Court to consider in passing on the merits of the controversy, the finding and judgment of the trial court will not be interfered with.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

G. S. Beyers, Defendant in Error, v. Anderson Tool Company, Plaintiff in Error.

Gen. No. 19,495. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action by G. S. Beyers against Anderson Tool Company to recover balance of commissions alleged to be due on sales of scales claimed to have been made as defendant's agent.

Plaintiff's claim was based on a contract claimed to have been entered into with one Fertick acting for defendant, whereby plaintiff was to sell defendant's scales in Chicago and to receive therefor a commission of thirty-five per cent. of the purchase price, seventy per cent. of such commission to be paid when the sale was made and the remaining thirty per cent. to be paid when the payment for the scale was completed.

After a trial before the court without a jury, plaintiff secured a judgment for \$126.

To reverse the judgment, defendant sued out a writ of error.

The principal errors alleged are that the amount of plaintiff's claim was not precisely set forth and sworn to, that the finding and judgment were against the preponderance of the evidence and that there was error in the admission of certain documentary evidence.

BRYAN, McCORMICK & WILBER, for plaintiff in error;
HOWARD H. McCORMICK, of counsel.

BELL & CROSS, for defendant in error.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim sufficiently states amount of claim.* In an action to recover a balance of commissions claimed to be due plaintiff from defendant on scales sold on commission for defendant, where *præcipe* and statement of claim state the nature of the claim and that it is for five hundred dollars, and the affidavit of plaintiff's claim states the demand to be for money due for services and commissions as set forth in the statement of claim, there is a sufficient statement of the amount of plaintiff's claim to comply with Rules 40 and 16 of the Municipal Court, even though the statement of claim admits that the exact number of scales sold by plaintiff and the exact number that had been fully paid for could only appear by defendant's records when produced, and though the affidavit of plaintiff's claim states there is due to plaintiff from defendant a sum of money, the exact amount of which is unknown to plaintiff.

2. PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to establish existence of agency in action for commissions.* In an action for a balance of commissions claimed to be due plaintiff from defendant on sales by plaintiff of defendant's scales, plaintiff's evidence showed that he was authorized by a third person to sell the scales in Chicago for defendant on a specified commission, part to be paid when each sale was made, the balance when the payment of the purchase price instalments were completed by the purchaser; that said third person represented to plaintiff that he represented defendant in Chicago; that said third person occupied a business place in which were kept defendant's scales; that said third person gave him blank forms of contract orders, prepared and printed in triplicate, to be signed by the purchaser also "for" defendants, "by" plaintiff, "salesman," one of such triplicates to be kept by the purchaser, one by plaintiff and one to be sent to defendant; that on receipt of the first of these orders, defendant sent plaintiff a check for the specified part of the commission; that on transmitting subsequent orders he received the specified part of the commission. For defendant, its secretary and vice-president swore separately that plaintiff was never employed by defendant and that at the time of sales made they were doing business as partners and controlled defendant's entire output; that the third person with whom plaintiff dealt worked for them and that plaintiff must, therefore, either have worked for them or for said third person. Defendant's

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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bookkeeper also testified that plaintiff was never in defendant's "direct employment, that is, * * * never had a contract." It was also agreed that the third person would have testified that he was sales agent for the partnership. To contradict evidence of defendant's secretary that his partnership had no authority to employ and had never employed a sales agent for defendant, such a contract was introduced in evidence. To contradict the evidence of defendant's vice-president and secretary as to when they became such officers, letterheads of defendant were introduced. It was held that the evidence was sufficient to establish plaintiff's agency for defendant.

3. WITNESSES, § 281*—*when documentary evidence admissible to impeach deposition.* Documents which show representations by a deponent contradictory to his statements in his deposition are admissible to impeach such statements.

4. TRIAL, § 245*—*when statement of court as to insufficiency of data for computation of finding not ground for reversal.* In an action to recover a balance claimed to be due on commissions on sales, a statement of the judge, at the earlier stages of the trial, that he did not have the data for the computation of a finding is not ground for reversal where it is not shown that he could not afterwards acquire the data.

**Eugenia Melly et al., Appellants, v. Robert S. Knox,
Executor, et al., Appellees.**

Gen. No. 19,648.

1. APPEAL AND ERROR, § 1488*—*when receipt of incompetent evidence by chancellor not reversible error.* Incompetent or irrelevant evidence received by a chancellor is not supposed to have been considered or regarded by him unless it appears affirmatively that his ultimate decision was affected by it.

2. WILLS, § 226*—*when intention of testator as to demonstrative or specific character of legacy controls.* The character of a legacy as demonstrative or specific is controlled by the intention of the testator as expressed in the will.

3. WILLS, § 454*—*whether legacy demonstrative or specific.* A testator's will left to certain persons "my property located in Lima,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Allen County, Ohio," describing it, "to be by them sold" and out of the proceeds thereof to pay the following bequests so far as the proceeds will go in the order indicated." The following day she executed a codicil changing the trustee and authorized the trustee thus named to sell and dispose of the personalty and realty and directed her to distribute the proceeds realized from the sale of any or all of said property equally between the testator's sisters and brothers named in her will, "the proceeds realized from the sale of the Lima, Ohio, property, however to be subject to the specific bequests provided in and by my said last will and testament." It was held that the legacies payable out of the proceeds of the Lima property were specific, and not demonstrative.

4. WILLS, § 455*—*when specific legacy adeemed*. Where a testator who gave a specific legacy payable out of the proceeds of certain realty which she directed her executor to sell, sold the realty herself, the legacy is adeemed.

5. WILLS, § 214*—*when allowance of counsel fees to contestants properly denied*. In the circumstances of the particular case, held that the allowance of counsel fees to persons contesting executor's construction of will properly denied.

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed January 25, 1915. *Certiorari* allowed by Supreme Court.

Statement by the Court. March 2, 1909, Sarah J. Tucker of Chicago, the second wife and widow of one Norman Tucker, executed a will. Her husband before his death had changed his residence to Chicago from Lima, Ohio, where he had been a prominent citizen and closely connected with the Protestant Episcopal Church there. Sarah J. Tucker owned some real estate in Lima. There were at the time the will was made two children of Norman Tucker—stepchildren of Sarah J. Tucker—living in Lima, by name, Chester P. Tucker and Eugenia Meily. Eugenia Meily was the wife of George H. Meily.

Mrs. Tucker, after providing in the first paragraph of her will that her debts should be paid, devised by the second one certain real estate situated in Chicago

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

to six sisters and a brother share and share alike. The third section of the will was as follows:

"I give and devise unto my sisters, Mary Wood, Nellie Mildren, Bessie Knox, Annie Detwiler, Lottie Poland and Emily Villa and unto my brother, William J. Cooke, share and share alike, my property located in Lima, Allen County, Ohio, and more particularly described as follows:" (Here follows description) "to be sold by them and out of the proceeds thereof to pay the following bequests so far as the proceeds will go in the order indicated.

(a) To my stepson Chester Tucker of Lima, Ohio, two thousand (\$2,000) dollars. (b) To my stepdaughter Mrs. George H. Meily (nee Eugenia Tucker) of Lima, Ohio, one thousand (\$1,000) dollars. (c) Two thousand (\$2,000) dollars for the erection of a monument on my lot in Oakwood Cemetery. (d) Fifteen Hundred (\$1,500) Dollars to be expended to place a memorial window in the Episcopal Church founded by my beloved husband in said Lima, Ohio. (e) One Thousand (\$1,000) dollars to be invested by the Trustees of The Oakwood Cemetery of Chicago, Illinois, for the purpose of defraying the expenses of keeping my lot in said Oakwood Cemetery in good order and condition."

The fourth clause of the will contains money bequests to a sister and a nephew. The fifth clause distributes various personal effects among ten different people, among them her sisters and her stepdaughter, Mrs. Meily. The sixth clause makes a residuary devise and bequest of all the remainder of her property, real, personal and mixed, to her brother and sisters, share and share alike. The seventh names her nephew, Robert S. Knox, executor of the will without bond. The will was duly witnessed on its date. On the next day, March 3, 1909, before the same attesting witnesses, Mrs. Tucker executed a codicil to her will of March 2, 1909, after the formal preface, running as follows:

"I give, devise and bequeath all the of the real estate of which I may die seized and all of the shares of the

capital stock in Chicago Railways Company, American Smelting and Refining Company, the United States Steel Corporation owned by me at my death, unto my beloved sister Lottie Poland as Trustee, with full power to said trustee to sell and dispose of the same or any part thereof or any interest therein—such manner as may be deemed wise or expedient by her, and in that behalf convey a good and perfect title to all of said property or any part thereof or any interest therein by trustee's deed without liability on the part of any of the purchasers from said trustee to look to the proper application of the purchase price paid therefor.

And I do hereby direct my said trustee to distribute the proceeds realized from the sale of any or all of said property equally between my sisters and brothers named in my said last Will and Testament, the proceeds realized from the sale of the Lima, Ohio, property however to be subject to the specific bequests provided in and by my said last Will and Testament in paragraph 3 thereof.

I hereby direct that my executor named in my last Will and Testament shall receive as compensation for his services as such Executor the sum of Five Hundred Dollars.

I do hereby reaffirm and republish my said last Will and Testament of March 2nd, 1909, except only as modified and controlled by this my first codicil to said last Will and Testament.

In witness whereof, I have hereunto subscribed my name and affixed my seal this third day of March, A. D. 1909."

December 7, 1909, Sarah J. Tucker sold and conveyed by warranty deed to one James O. Ehler her property in Lima described in her will, receiving therefor \$7,500 in cash. January 16, 1910, she died and the will and codicil before recited were admitted to probate in the Probate Court of Cook county March 26th in that year. Letters testamentary were issued to Robert S. Knox as executor. The inventory filed in the Probate Court showed that her estate then consisted of thirty shares of United States Steel Corporation stock, ten shares of American Smelting and Re-

fining Company stock, eight shares Chicago Railways Company stock, \$7,386.10 in cash, \$1,524.25 worth of personal effects, and certain real estate in Cook county, Illinois.

October 31, 1911, the appellants herein Eugenia Meily and The Parish of Christ Protestant Episcopal Church of Lima, Ohio, filed a bill in equity in the Superior Court of Cook county, of which, after amendment, the two paragraphs setting forth their alleged grievances and contentions are:

"5. Your orators further show that by the terms of said will and the codicil thereto it was the intention of said testatrix as expressed therein that your orators should have and be paid out of the assets of her estate upon her decease the several amounts of money as legacies specified in said third clause; and the said Chester P. Tucker and the Cemetery Association also named in the third clause were bequeathed and were to be paid out of the assets of her estate the several amounts specified therein, and said bequests and each of them were also made a charge upon the Lima property, and upon the sale and transfer of said real estate of the testatrix prior to her decease, said legacies and each of them became general charges upon the remainder of the real and personal estate left by her at her decease; and your orators and the other persons whose legacies were charged upon the Lima property are entitled to be paid their said legacies out of the general estate of the testatrix.

6. Your orators further show that they have requested Robert S. Knox, the executor of Sarah J. Tucker, deceased, to recognize and pay their legacies, but said executor refuses to do so and claims that under said will and codicil as construed by him and the law, your orators are not entitled to the said legacies provided for in the third clause and in the codicil of the will or to any part thereof, and he has refused to recognize complainants as legatees or devisees under said clause of the will or the codicil, or to make payment of the said legacies to your orators out of the estate of the deceased, and said executor threatens to

distribute all of the assets of said estate to the other legatees and to ignore the said legacies and to refuse to pay to your orators or to the said Chester P. Tucker or to the Cemetery Association the several legacies bequeathed to them by said third clause and the codicil to said will."

To this bill Robert S. Knox, executor, Lottie Poland as trustee, the six sisters and the brother of Mrs. Tucker (who were her only heirs at law and next of kin), Chester P. Tucker, The Oakwoods Cemetery Association, Albert Smith, Marguerite Poland and Elizabeth Long (the last three being among the beneficiaries of the legacies of personal effects), were made defendants.

All the defendants but Robert S. Knox, executor, Bessie D. Knox and The Oakwoods Cemetery Association were defaulted. The Oakwoods Cemetery Association answered the bill, admitting its allegations and alleging that upon a proper construction of the will and codicil in question it was entitled to the legacy of \$1,000 in the third paragraph of the will mentioned.

Robert S. Knox and Bessie D. Knox answered, denying the rights of the complainants and of Chester P. Tucker and The Oakwoods Cemetery Association to have the legacies named in the will paid out of the general assets of the estate, and alleging on the contrary that it was the intention of the testatrix, as shown by her act in selling the Lima property before her death and by other circumstances, that "the amounts therein charged upon the real estate aforesaid should lapse and that the said amounts should not be paid to the various persons and corporations named in said third clause of the will."

Replications were filed to these answers and the cause came to a hearing. The final decree found:

"That the equities in this cause are with the defendants, excepting the defendants The Oakwoods Cemetery Association and Chester P. Tucker, and that the complainants herein are not entitled to all or any of

Melly v. Knox, 191 Ill. App. 126.

the relief in said bill of complaint prayed, and that the defendant The Oakwoods Cemetery Association is not entitled to any of the relief to which said defendant in its answer claims to be entitled, and that neither the complainants nor the defendants The Oakwoods Cemetery Association and Chester P. Tucker are entitled to receive any legacies or payments on account of anything contained in the third clause of the will of Sarah J. Tucker, deceased," and ordered that the amended bill be dismissed for want of equity at the cost of complainants. From this decree the complainants appealed to this court.

SIMMONS & IRVING, for appellants.

FOREMAN, LEVIN & ROBERTSON, for appellees.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

The question before us is simply whether the legacies in question were demonstrative legacies or specific legacies. The assignment of error concerning the admission of incompetent evidence may be treated as practically negligible. A chancellor who receives incompetent or irrelevant evidence is not supposed to have regarded or considered it, unless it appears affirmatively in some way that his ultimate decision was affected by it. There is no reason to suppose that the admission of the letter of December 9, 1909, from Mrs. Tucker to Mrs. Melly, whether or not it were competent, did affect the decision of the court in this cause. Indeed, the inference is very strong from the refusal of the chancellor to admit the testimony of Robert S. Knox and Bessie D. Knox, which counsel said would show that Mrs. Tucker after making the will and codicil in question herself placed a construction on them on the very question herein involved, by saying that she was very happy that the sale of the Lima property had been made "and very glad that it

would cut out the Meily heirs, who never had done anything for her," showed that he did not deem anything which Mrs. Tucker said after the execution of the documents involved competent even to throw light on her intention when phrasing the will as she did. This ruling may have been correct as bearing a relation at least to the general doctrines that as to the intention of the testator the will must be construed as of the date of execution, and that the intention expressed by written instruments generally is to be gathered from the language used in them and not from extrinsic sources.

Nevertheless, in this case, where the gist of the whole contest is really what, in the use of certain language, was the intention of the testator as to limiting the operation of a bequest, a plausible argument could be made to the contrary. The question is not before us, for the court excluded the offered testimony and, as we have said, may fairly be supposed to have ignored the "Dear Jennie" letter (as the letter of December 9, 1909, is called in the argument) as throwing any light upon the meaning of Mrs. Tucker's will.

Much is said by counsel for the appellant about the impossibility of a "revocation" of the will by anything that could be said or done by Mrs. Tucker except the destruction or cancellation of the old will or the making of a new one. It seems beside the point, for no revocation is claimed or suggested. The real question, as we have said, is simply whether the bequests to Chester P. Tucker, to Mrs. Meily, to Oakwoods Cemetery and to Christ Church were demonstrative or specific legacies. That question, in our opinion, is simply the technical method of stating this inquiry: Do the words employed by Mrs. Tucker in her will and codicil (the codicil indeed being, as her latest expression, controlling and governing) show an intention that these legacies shall be paid only if at her death the Lima property should remain a part of her estate

and pass from her to Lottie Poland as trustee; or do they express an intention that they should be paid at all events if her estate contained assets sufficient, but that the proceeds of the Lima property, if the trustee received and disposed of it, should be primarily the fund to be resorted to for their payment?

In the former case they were specific legacies; in the latter demonstrative. If "specific" they were bequests of a specified part of the testator's estate if it existed at the time of the taking effect of the will at the testator's death. If it did not exist, because the testator had parted with that part of her estate between the time of making her will and the time of her death, the legacies were "adeemed," which only means that they were "taken away" by the extinction as a part of the estate of the fund out of which they were to be paid. Mrs. Tucker by her will, for example, bequeathed one blue and gold enamel plaque and nothing else to Elizabeth Long. If Mrs. Tucker had sold the plaque while living, Elizabeth Long would have received nothing by the will, this being an illustration of a specific legacy concerning which there could be no dispute. If, however, the bequests here in discussion were "demonstrative"—that is, if the language by which they were given showed an intention that whether or not the Lima property remained a portion of the estate at the time of her death, the legacies should be paid; but that if the Lima property was a portion of the estate it should be sold and the proceeds form primarily but not exclusively the fund from which they should be paid—then they were not "adeemed" by the sale of the property by Mrs. Tucker before her death.

The counsel for appellant with great diligence have made a catena of authorities, many of them containing very interesting discussions of the distinctions between general, specific and demonstrative legacies, and more particularly, as the bequests involved generally

raised only that point, the difference between "specific" and "demonstrative" legacies. The counsel for appellee has discussed some of these cases and cited others, and we have not by any lack of investigation of them rendered this court obnoxious to the criticism which Lord Eldon made on passing a question like that involved herein, "without observation" or "with little observation." *Sibley v. Perry*, 7 Vesey Jr. 522. It would be useless, however, for us to load this opinion with an elaborate discussion of the authorities or their varying degrees of weight.

One controlling principle practically runs through them all. It is that while courts may lean to construing legacies as demonstrative rather than specific, that they may not fail, this leaning and all other presumptions will give way if the intent of the testator to the contrary is fairly exhibited by the words of the will.

This is but the corollary of the famous and sound utterance of Mr. Justice Wilmot in the King's Bench, supporting the opinion of Lord Mansfield in *Doe v. Laming*, 2 Burrow, 1100, that "the intention of the testator is the pole star for the direction of devises," and that all cases which depend upon it "are best determined upon comparing all the parts of the devise itself without looking into a multitude of other cases, for each stands pretty much upon its own circumstances."

Many of the cases cited by counsel in this cause very definitely express this controlling principle. We note some as examples.

Lord Cottenham in *Creed v. Creed*, 11 Clark & Finnelly 491, said in giving his opinion in the House of Lords:

"There are many cases in which though a legacy be charged upon a particular fund, it does not fail by failure of the fund, which are called demonstrative legacies, but these all proceed upon the construction showing a general intent."

And in *George Infirmary v. Jones*, 37 Fed. 750, Judge Wallace of the U. S. Circuit Court said:

"Whenever it can be inferred from the language of the will that the testator's intention was to give the legatee a specified sum, not necessarily out of a particular fund, although incidentally and primarily so, but irrespective of it, the gift will be construed as demonstrative, instead of a specific legacy," and then he quotes from *Walls v. Stewart*, 16 Pa. St. 281, certain language of Judge Bell in that case to the same effect. The opinion in *Walls v. Stewart* contains other statements of the principle. Thus the Court says:

"I think an examination of the authorities English and American will show that wherever an intent is exhibited to make distribution of the value of lands, either by means of a sale and division of proceeds or by the charge of a sum in monies payable by the devisee of the land as a quasi partial purchase of the estate devised, the bequests are always treated as specific, and consequently liable to be adeemed by an alienation of the land in the life time of the testator," and:

"In this as in other questions springing from the construction of wills, the intention of the testator is principally to be ascertained."

In *Re Stilphen*, 100 Me. 146, the Supreme Court of Maine says:

"The distinction between a specific and a demonstrative legacy involves not merely a technical question, depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all of the other provisions of the will."

And again:

"It is important to observe that two elements are necessary to constitute a demonstrative legacy. It must appear in the first place that the testator intended to make an unconditional gift in the nature of a general legacy, and, secondly, the bequest must indicate the fund out of which it is payable."

In *Stoever's Estate*, 45 Pa. Super. Ct. Rep. 451, the Presiding Judge of the Orphans' Court of Lebanon county had said in deciding certain legacies specific:

"Bearing in mind the somewhat shadowy distinction of the cases, that courts incline against construing legacies as specific, and that the intention of the testator should be clear to make a legacy specific, we must, however, not lose sight of the fact that the primary purpose of all rules of construction and interpretation is to arrive at the intention of the testator."

In affirming the decree the Supreme Court of Pennsylvania said:

"It is clear enough * * * that where the language of a testator * * * fairly exhibits his intention that certain legacies should be classed as specific rather than general or demonstrative, the courts will readily declare and effectuate such intent."

A Judge of the Circuit Court in Ohio (*Sharp v. McPherson*, 3 Ohio Dec. 468) said that:

"While the determination of the question" (*which was whether a legacy very similar to the one at bar was demonstrative or specific*) "is governed somewhat by the rules of law applicable thereto, yet it depends principally upon the intent of the testator. What did he intend? Did he intend to give the specific thing or to limit the gift to the particular subject matter? Or did he intend to give an amount of money in any event and refer to the fund merely as a convenient means of payment?"

We are of the opinion that in this case the question for us to answer is exactly the same. What did the testator intend to give? Did she intend to give the proceeds of the Lima property, if she died possessed of it, up to a certain amount, "so far as those proceeds would go" and "in the order indicated," or did she intend to give the sums of money "in any event and refer to the fund merely as a convenient means of payment"?

If the "language of the testator fairly exhibits her intention that the legacies should be classed as specific

rather than demonstrative," we must "declare and effectuate said intent."

We think that the language used in the will and codicil in this case does fairly exhibit this intention.

The only gift of the legacies involved is found in the direction to pay them out of the land devised. The testator, making other pecuniary legacies, made them in a separate paragraph without limitation. If she had desired these legacies in question paid in any event, there is no particular reason revealed by the language of the will for making them "demonstrative" rather than like the others, "general."

Moreover, the language the testator used in the paragraph (3) of her will in which she provides for these legacies is entirely inconsistent with the idea that if the Lima property was for any reason unavailable or even insufficient to pay them, they should be paid out of the general estate as they would be if they were "demonstrative" instead of "specific." She must have known herself to be solvent and believed that her estate would be, and yet she directed that the legacies should be paid only so far as the proceeds of the Lima property "would go" in a certain order indicated. And when, the day after the will was drawn, she changed her mind as to who should hold the trust of her real estate, she emphatically repeats what we think was the expressed intention in the will—to make the proceeds of the sale of the Lima property the only fund from which these legacies were to be paid. For she leaves all her real estate and all her stocks to her trustee. She gives her trustee power to sell it all, and then directs that the proceeds shall be distributed among her brother and sisters, "the proceeds realized from the sale of the Lima, Ohio, property, however, to be subject to the * * * bequests provided in and by" her will.

It seems plain to us that the use of this language shows that the proceeds of all the property named ex-

cept those of the Lima property were *not* to be subject to the bequests in question.

We have omitted the word "specific" from the above quotation from the codicil because we wished to imply that we did not consider that the force of the argument was much heightened by it. It may have been used, as appellants argue, without reference to its technical meaning as applied to bequests. But it is certain that the use of it does not detract from the probability of the correctness of the conclusion at which we have arrived.

To our minds, quite as plausible an argument advanced by the appellants in behalf of their contention as that the legacies were demonstrative is that they should be considered as a specific charge transferred from the Lima property to the *proceeds* of the Lima property in the hands of the testator after she sold that property, and that so far as those proceeds came into the hands of the executor they were affected by the same charge.

But this argument, even if plausible, is not sound. Apart from the question which is raised by the appellees, of the proof of identity of the proceeds with the cash inventoried in the estate, and assuming that identity, we must hold the legacies adeemed from the moment that Mrs. Tucker conveyed the property itself from which they were to be paid. The intention expressed by the terms of the will affects this situation also. The intent to be gathered from the terms of the will, if it was an intent to make the Lima property in her post mortem estate the fund from which the legacies were to be paid, was an intent also to relieve the general estate from the payment of them. The money into which the land was turned before her death became a part of Mrs. Tucker's general estate.

There is no question of a revocation of the will, or even of the "revocation of a devise"—a term which it may be noted the Court in *Sharp v. McPherson*,

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supra, with a want of precision uses. It is still all a question of the construction of the will under the guidance of the "pole star" of intent. While, as counsel say, wills cannot be "revoked" by sales by the testator, legacies can be and often are "adeemed," that is, taken away, because there is nothing left in the estate for them to operate on. That was, in our opinion, done in the matter under consideration.

We do not think this is a case where the court should have used a possible discretion to allow counsel fees to the persons differing in opinion from the executor as to the construction of the will and litigating adversely to him to compel his compliance with their demands.

The decree of the Superior Court is affirmed.

Affirmed.

John Dooley, Appellee, v. Patrick Ahern et al., on appeal of E. R. Stege Brewery, Appellant.

Gen. No. 19,751. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Suit for foreclosure by John Dooley against Patrick Ahern, Bridget Ahern and E. R. Stege Brewery.

The mortgage to foreclose which the suit was brought was in form a warranty deed, by Patrick Ahern and Bridget, his wife, and was given to secure the payment of loans made at various times from September, 1903, to February, 1910, by Dooley to Ahern and the interest on the loans. The premises

covered had been occupied by the Aherns, part of the building being used as a store or saloon and part being used by them as a residence. At the time the deed was executed, they had rented out all of the premises, but they had the intention of returning to it as a residence after the expiration of the lease and actually did so. The deed, which was dated and acknowledged October 20, 1911, was filed in the office of the recorder of Cook county on October 21, 1911, at 11:34 A. M.

While conducting the liquor business on the premises, Ahern became indebted to E. R. Stege Brewery and, with his wife, had given to it a judgment note.

On October 21, 1911, at 12:11 P. M., a *narr* and *cognovit* based on the note and power of attorney was filed in the office of the clerk of the Circuit Court of Cook county. Judgment was immediately entered and an execution was subsequently issued and a levy under it made on the premises. Thereafter the premises were sold by the sheriff under the levy and were bought by the Stege Brewery to which a certificate of sale was duly issued. The certificate was duly recorded by the Brewery.

The decree in the foreclosure proceeding provided that the property should be sold under the usual conditions of a foreclosure sale and that the proceeds should go: First. To satisfy the amount which it secured, with interest from the date of the decree; second, if there should be a surplus, to pay Patrick Ahern one thousand dollars for the homestead which it found him entitled to, subject only to the waiver thereof in the deed of warranty; third, if there should be a further surplus, such surplus to be held by the master making the sale subject to the further disposition which the court might make thereof. In the decree it was also found that the interest of E. R. Stege Brewery was subordinate and subject to Ahern's homestead.

Dooley v. Ahern, 191 Ill. App. 140.

From this decree only E. R. Stege Brewery appeals, alleging as error the admission of improper evidence; the entry of the decree in favor of complainant; the failure to find that a part of complainant's claim was barred by the statute of limitations; the finding that complainant's lien was superior to that of E. R. Stege Brewery; the failure to find that the warranty deed was fraudulent; the reopening of the case after the hearing was closed and argument had to admit evidence removing certain of complainant's claims from the bar of the statute of limitations; the finding that Ahern was entitled to a homestead as against the Brewery; the allowing complainant the benefit of fractions of a day in ascertaining the priority of the liens.

SIMEON STRAUS and IRA E. STRAUS, for appellant.

VINCENT D. WYMAN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 81*—*when reopening of case by master to hear evidence not an abuse of discretion.* On a reference to a master in a proceeding to foreclose a warranty deed given as a mortgage to secure certain loans, the master may, in the exercise of his discretion, reopen the case, after it has been declared closed and the argument heard, to hear evidence on a subsequent promise to pay loans which were barred by the statute of limitations.

2. LIMITATION OF ACTIONS, § 85*—*how affected by giving of mortgage to secure pre-existing debt.* The giving of a mortgage to secure a pre-existing debt will stop the running of the statute of limitations or revive a debt where barred.

3. MORTGAGES, § 56*—*when evidence insufficient to show that warranty deed given as a mortgage is fraudulent.* The mere fact that there are circumstances tending to show a desire on the part of a debtor to prefer a personal creditor to a business creditor is not sufficient to render fraudulent a warranty deed given as a mort-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

gage securing the indebtedness to the former creditor, where the evidence shows that debt to secure which it was given was for money actually loaned by the personal creditor to the debtor.

4. MORTGAGES, § 13*—*when form does not render deed given as mortgage fraudulent.* The fact that an instrument which is, in fact, a mortgage is, in form, a warranty deed does not render it either conclusively or constructively fraudulent in so far as it is based upon an actual consideration, even though, in the bill to foreclose it, after accurately describing the apparent form and real nature of the instrument, the complainant adds an alternative prayer that in the event the deed shall be construed as a trust rather than a mortgage, then the levy of judgment and certificate of sale thereunder to a defendant creditor shall be set aside as a cloud on complainant's title to the premises.

5. MORTGAGES, § 56*—*when evidence insufficient to raise presumption of fraud in warranty deed given as mortgage.* Where the evidence shows that a warranty deed given as a mortgage was given to secure a bona fide indebtedness, the mere fact that the manner and circumstances in which it was given indicate an intention to prefer one legitimate debt to another is not sufficient to raise a presumption of fraudulent intent.

6. MORTGAGES, § 56*—*when evidence sufficient to overcome possible presumption of fraudulent intent in giving warranty deed as mortgage.* Any possible presumption of fraudulent intent which may arise from the fact that an instrument given as a mortgage to secure a debt was in form a warranty deed, and was given in circumstances indicating an intention to prefer the creditor, is overcome by evidence that the debt was bona fide and that the attempt was not to delay or defraud creditors but merely a legitimate and meritorious effort to prefer the grantee.

7. TIME, § 4*—*when fraction of a day to be considered.* In a proceeding to establish the relative superiority of a warranty deed to property and a judgment entered on the same property, equity may take notice of the fact that the deed was recorded thirty-seven minutes before the entry of the judgment.

8. HOMESTEAD, § 101*—*when evidence insufficient to show intention of owner not to return.* On an objection to an allowance of a homestead estate in a debtor's property, on the ground that he had left the property with no intention of returning, direct evidence of the debtor that this was his intention with evidence that he did, in fact, return cannot be overcome by merely alleging a suspicion that he did not intend to return.

9. MORTGAGES, § 114*—*when prior to lien of judgment.* A debtor who was indebted for bona fide loans, gave to the creditor to secure

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the debt a mortgage which was in form a warranty deed which deed was filed by the creditor for record in the office of the recorder of Cook county the day after it was executed. The same creditor had previously given another creditor a judgment note and on the day the deed was filed for record, but thirty-seven minutes later, the latter creditor filed a *narr* and *cognovit*, based on the note and a power of attorney, in the office of the clerk of the Circuit Court of Cook county, judgment was immediately entered thereon and execution was thereafter issued on the judgment, a levy under it was made and the premises were sold under the levy and bought by the judgment creditor, who received a certificate of sale which was duly issued and duly recorded. On a proceeding thereafter to foreclose the mortgage of the first creditor, it was *held* that his lien was prior to that of the second creditor.

**Jacob Feder, Defendant in Error, v. Clara Greenberg,
Plaintiff in Error.**

Gen. No. 20,177. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the March term, 1914. **Affirmed.** Opinion filed January 25, 1915.

Statement of the Case.

Action by Jacob Feder against Clara Greenberg and B. Greenberg.

The claim was stated to be for "a balance due for labor and material furnished to defendant under a written building agreement * * * between plaintiff and defendant, a copy of which is hereto attached." The copy attached purports to be a contract between B. Greenberg and J. Feder. The balance was made up of claims for "columns furnished by plaintiff to defendant on said building," and for "hardware fur-

nished said building by the plaintiff for the defendant.”

The affidavit of plaintiff's claim is to the effect that the nature of his demand is “for balance due for labor and material furnished to defendants by plaintiff and for labor and material as above stated.”

The Municipal Court rendered judgment by default against the defendants which was, subsequently, set aside on motion. Thereafter the action against B. Greenberg was dismissed. That against Clara Greenberg, who was not present and not represented, was heard by the court without a jury, and the issues were found against defendant and judgment was entered against her for \$374.75.

To reverse this judgment, the defendant Clara Greenberg has sued out this writ of error, the errors assigned being that the finding is contrary to the law and evidence and that the court had no jurisdiction to enter judgment by default.

BENJAMIN E. COHEN, for plaintiff in error.

LEE & LEE, for defendant in error.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 101*—*when absence of defendant does not render judgment one by default.* Where a defendant is in court by appearance, the mere fact that he was not present at the trial does not render the judgment against him a judgment by default, where it was given after evidence and argument had been heard.

2. APPEAL AND ERROR, § 787*—*when bill of exceptions necessary.* A bill of exceptions must be preserved in order to enable the Appellate Court to pass upon an assignment of error that the finding of the trial court is contrary to the evidence.

3. PLEADING, § 50*—*when evidence against one defendant admissible in action against joint defendant.* The fact that the state-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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ment of claim in an action against two defendants shows the claim under one construction of the statement, to be wholly and under another partially founded on a written agreement signed by one defendant only, does not render incompetent any evidence whatsoever which shows a claim against the other defendant alone.

4. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim in fourth-class case sufficiently exact.* Exactness and precision in the statement of claim in a fourth-class case in the Municipal Court of Chicago are not required, but the claim is sufficient if the defendant is apprised of the nature of the demand against him, and inaccuracy is not a ground for reversal where prejudice therefrom is not shown.

5. MUNICIPAL COURT OF CHICAGO, § 13*—*when variance in statement of claim in fourth-class case waived.* Variance in a statement of claim in a fourth-class case is waived by failure to object.

C. G. Goodwin, Appellant, v. Oregon Short Line Railroad Company, Appellee.

Gen. No. 20,256. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action of the first class by C. G. Goodwin against Oregon Short Line Railroad Company for damages by failure to furnish stock cars at a specified place and time.

Plaintiff's evidence showed that he requested defendant's local station agent to have a certain number

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of stock cars delivered at a certain station on a specified day; that the agent told him to call again at a later date in reference thereto; that on his inquiring on the later date, the agent postponed his answer to the following day; that on his third inquiry, the agent informed him the cars would be furnished as requested, stating that he had received a telegram from the defendant's "dispatcher" at another point to that effect; that the cars were not furnished until eighteen days after the date set.

The evidence showed that the station at which the cars were to be delivered was not on defendant's line nor at a junction point with its line and that the "dispatcher's" station was not at a junction of its line with the line on which the delivery station was located.

On an instructed verdict of the jury, the defendant obtained a judgment of *nil capiat* and costs. From this judgment, plaintiff appeals.

CHARLES A. BUTLER, for appellant; FRANKLIN RABER, of counsel.

JOHN A. SHEEAN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 222*—*when station agent not authorized to bind carrier to furnish cars on another line.* A local station agent has no implied, presumptive, apparent or incidental authority to make a contract binding the carrier to furnish cars at a station on a foreign road at a certain date for the shipment of live stock.

2. CARRIERS, § 247*—*when burden not on carrier to show shipper's knowledge of agent's lack of authority.* In an action to recover damages caused by the failure of a carrier to furnish stock cars at a point on another line on a certain day, as its station agent

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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had agreed to do, the burden is not on the carrier to show that the shipper knew that the agent had no authority to make such an agreement, there being no evidence that the agent had either express or implied authority to do so.

3. CARRIERS, § 248*—*when evidence as to agent's authority inadmissible.* In an action against a carrier for damages caused by its failure to furnish stock cars at a point on another line on a certain day, pursuant to an alleged agreement of its local station agent, it is not error to refuse to permit the jury to consider on the question of the agent's authority evidence of the statement by the agent that he had received a telegram from the carrier's "dispatcher" at a certain station, not a junction point with the foreign line, that the cars would be at the agreed station on a certain day, there being no evidence that the dispatcher's authority to make such an agreement was any greater than that of the agent.

4. CARRIERS, § 248*—*when evidence insufficient to show ratification of agent's promise to furnish cars.* In an action against a carrier for damages caused by its failure to furnish stock cars at a point on another line, on a certain day, as its local station agent had agreed it would do, the fact that cars were furnished at the point on the foreign line eighteen days later is not evidence of ratification of the agent's agreement, where the evidence shows that the cars so furnished were delivered by the carrier to the foreign road at a junction point and thereafter the distribution was controlled by such foreign road.

5. APPEAL AND ERROR, § 1466*—*when rejection of evidence not reversible error.* In an action against a carrier for damages caused by its failure to furnish stock cars on a certain day at a point on a foreign line, in violation of an agreement made by a local station agent, it is not reversible error to refuse to allow or compel the carrier's assistant general freight agent to answer questions as to the orders to the station agent at another station for the placing of cars on another road, where the answers to similar previous questions did not sustain plaintiff's case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

P. E. Short, Appellant, v. Oregon Short Line Railroad Company, Appellee.

Gen. No. 20,255. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

The transactions out of which the present action grew are those involved in *Goodwin v. Oregon Short Line R. Co.*, ante, p. 146. While there are some differences in the records, principally that in the present case the plaintiff did not examine Tuttle, defendant's assistant general freight agent, and that the number of sheep was different, the delay and the shrinkage in weight were greater and larger damages were claimed, the same principles and the same rules of law control, and the judgment for defendant is therefore affirmed.

CHARLES A. BUTLER, for appellant; FRANKLIN BABER, of counsel.

JOHN A. SHEEAN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

CARRIERS, § 222*—when not liable for failure to supply cattle cars. The decision herein is controlled by that announced in *Goodwin v. Oregon Short Line R. Co.*, ante, p. 146, which involves the same transactions.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lord & Thomas v. Sanitary Drinking Cup Co., 191 Ill. App. 150.

Lord & Thomas, Appellee, v. Sanitary Drinking Cup Company, Appellant.

Gen. No. 20,271. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action on contract by Lord & Thomas, a corporation, against Sanitary Drinking Cup Company, a corporation.

The contract provided for services to be rendered by plaintiff for a term of one year as advertising agent for defendant. Plaintiff was to receive for its services the net cost of all advertising space purchased by it for defendant plus a commission of fifteen per cent. above the cost, to be increased in certain cases to twenty-five per cent. Defendant guarantied that the commissions for the year's business would be equal to \$1,500 annually, and that in the event they fell below that amount defendant would pay plaintiff, twelve months after the date of the contract, the difference between \$1,500 and the amount of commissions received. The advertising was discontinued by defendant before the expiration of the contract and when the commissions had reached \$122.42.

Judgment was rendered for plaintiff on December 22, 1913, on an instructed verdict of the jury for \$1,452.48, representing the balance of \$1,377.58 and interest for slightly over thirteen months at the legal rate, the contract being dated November 8, 1911.

From this judgment, defendant appeals.

LOUIS BRANDES, for appellant.

MOSES, ROSENTHAL & KENNEDY, for appellee.

Lord & Thomas v. Sanitary Drinking Cup Co., 191 Ill. App. 150.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 437*—*when evidence as to defense not pleaded properly excluded.* In an action against a corporation to recover the balance due on a contract executed for the corporation by its secretary and treasurer, evidence that he had no authority to execute is properly excluded where the pleadings do not set up the nonexecution of the contract by the defendant as a defense.

2. PLEADING, § 321*—*when verification of issue of nonassumpsit insufficient.* In an action against a corporation to recover the balance due on a contract alleged to have been executed for the defendant by its secretary and treasurer, defendant pleaded the general issue of nonassumpsit without an affidavit verifying the plea or denying the execution, though it filed an affidavit of merits. It was held that the affidavit did not meet the requirements of sec. 52 of the Practice Act in relation to denying the execution of an instrument sued on.

3. CORPORATION, § 382*—*when bound by contract of officer.* Where a corporation acknowledged and acted upon a contract executed for it by its secretary and treasurer, express authority to the officer to make it originally is not material.

4. DAMAGES, § 81*—*when question of liquidated damages or penalty not involved.* In an action to recover for the balance due on a contract which provided that plaintiff should receive a certain sum as a minimum for the services undertaken by it and a larger sum in a certain event, where the evidence shows a breach of contract by defendant, no question of penalty or liquidated damages is involved in a verdict for the minimum fixed by the contract.

5. INTEREST, § 8*—*when allowed in action on contract.* Where a contract in writing provides for services for a term of one year and that as consideration for such services the party rendering them shall receive commissions on the amounts expended by him, the other party guarantying that the amounts of such commissions will be equal to \$1,500, and that should they not reach that figure said other party will pay the difference between \$1,500 and the amount actually recovered, in an action to recover the amount of such difference, it is proper, in a verdict for plaintiff, to include interest.

6. CORPORATIONS, § 66*—*when seal unnecessary on contract of corporation.* A seal is not necessary on a contract for services for the term of a year entered into for a corporation by its secretary and treasurer.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gilmore v. Bidwell, 191 Ill. App. 152.

**Anna B. Gilmore, Appellant, v. Joseph E. Bidwell, Jr.,
Clerk, Appellee.**

Gen. No. 20,294.

1. JUDGMENT, § 360*—*when collateral attack not allowed.* The jury, in a suit in the Circuit Court of Cook county, by an administrator, to replevy certain shares of stock claimed for the estate, found that the right of possession was in the administrator, and assessed one cent as damages "for detention of said property." Judgment was entered on the verdict that "the plaintiff do have and retain the property replevined herein by virtue of the writ of replevin issued in said cause," and that plaintiff recover his damages "in form as aforesaid by the jury assessed." By an order entered *nunc pro tunc* in the cause, the court directed that the certificates, which had been introduced as evidence in the cause, be impounded in the hands of the clerk of the court subject to its further order. Thereafter the defendant in that cause made demand of the clerk for the certificate and upon his refusal to deliver, filed an affidavit of replevin. The writ was returned by the sheriff unexecuted, and thereafter defendant filed a declaration in the Superior Court of Cook county joining counts in trover. The defendant in the second suit pleaded a part of the matters recited above and the plaintiff, by replication, set up the same and additional matter of fact and also matters or conclusions of law derived therefrom. To this replication plaintiff demurred on the ground that plaintiff was attempting in a collateral proceeding, involving the same subject matter, to attack the judgment of a court of concurrent jurisdiction and the jurisdiction of such court in the proceeding. It was *held* that the demurrer was properly sustained and judgment properly rendered for defendant.

2. REPLEVIN, § 32*—*when officer of court not subject to.* Where an officer of the Circuit Court holds a certificate of stock in his official capacity under the order of the court, replevin for it will not lie against him in a court of concurrent jurisdiction.

Appeal from the Superior Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed January 25, 1915. Petition for *certiorari* dismissed by Supreme Court.

Statement by the Court. July 26, 1911, one John F. Devine, as administrator with the will annexed of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Orrin F. Place, deceased, began a replevin suit in the Circuit Court of Cook county against Anna B. Gilmore. The property to be replevied was six certificates of shares of stock in the Saratoga Gold Mining Company of Arizona. The replevin writ was issued and returned by the sheriff with this indorsement:

“The plaintiff giving security as per bond hereto annexed, I have executed the within writ by reading the same to the within named defendant, Anna B. Gilmore, on the 27th day of July, 1911, and demanded of her that she turn out the within described property, which she refused to do, and being unable to find the said property, which in my custody, I return this writ not executed as to the within described property this 21st day of August, 1911.

MICHAEL ZIMMER, Sheriff,
by Joel N. Arnett,
Deputy.”

The plaintiff filed in the Circuit Court a declaration containing counts both in replevin and trover.

This cause came on for trial in June, 1912, in the Circuit Court of Cook county before Judge Tuthill of that court, sitting with a jury. In response to a notice in writing served upon the attorneys of Anna B. Gilmore, she produced during said trial, in open court, the stock certificates involved, to be used as evidence. They were offered by the plaintiff in evidence and admitted in evidence. Afterwards, at the request of the plaintiff and over the objection and exception of the defendant, Judge Tuthill orally directed that said certificates be delivered by the plaintiff to Joseph E. Bidwell, Jr., as clerk of the Circuit Court of Cook County, Illinois, for safe-keeping. The judge did not make any memorandum of his said oral order, but in compliance with said oral order the said stock certificates came into the possession of and were impounded in the hands of the defendant as clerk of the Circuit Court of Cook county and have since there remained.

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On June 27, 1912, the same being one of the days of the June term, the jury returned a verdict in said cause in the following words:

"We, the jury, find the defendant guilty and that the right to the possession of the property in question is in the plaintiff as administrator of Orrin F. Place, deceased, and assess the plaintiff's damages for detention of said property at the sum of no dollars and one cent."

July 13, 1912, also a day of the June term, 1912, of the Circuit Court, a motion for a new trial and a motion in arrest of judgment were made by Anna B. Gilmore and overruled by the court. On the same day a judgment was entered by the Circuit Court as follows:

"Wherefore it is considered by the Court that the plaintiff do have and retain the property replevined herein by virtue of the writ of replevin issued in said cause, and do have and recover of and from the defendant his damages of one cent in form as aforesaid by the jury assessed, together with his costs and damages in this behalf expended, and have execution therefor."

An appeal from this judgment was prayed by Anna B. Gilmore and allowed, but no appeal or writ of error has been prosecuted therefrom.

On July 26, 1912, one of the days of the July term, 1912, of the Circuit Court, Judge Tuthill caused an order to be entered of record in said cause in the following words:

"T. N. 10460

G. N. 307428

JOHN F. DEVINE, Admr.

v.

ANNA B. GILMORE.

In the Circuit Court of Cook County, Illinois.

It is hereby ordered that the certificates of stock in the Saratoga Gold Mining Company of Arizona issued to Orrin F. Place as follows: (*Here follows a description of the certificates involved in the action*) "introduced as evidence in the above entitled case be and the same are hereby impounded in the hands of the Clerk of this Court for safe-keeping and as evidence

and be retained by said Clerk until the further order of this said Court.

It is further ordered that this order, the same having been virtually made in said case, on the 13th day of July, 1912, be now entered *nunc pro tunc* as of said 13th day of July, 1912.

B. S. TUTHILL, Judge.

July 26, 1912."

July 24, 1912, Anna B. Gilmore had made a demand in writing upon Bidwell as clerk for said certificates, and on July 25, 1912, the day before the entry of the above quoted *nunc pro tunc* order, an affidavit for replevin was filed in the Superior Court of Cook county by Anna B. Gilmore, alleging that she was the owner of the stock certificates in question; that on June 26, 1912, Joseph E. Bidwell, Jr., as clerk of the Circuit Court of Cook county, had wrongfully taken them and at the time of the affidavit wrongfully detained them. A writ of replevin was issued and a bond filed with the sheriff on said June 25, 1912.

The sheriff made a return on the writ August 5, 1912, that he had served it on July 25, 1912, on Joseph E. Bidwell, Jr., as clerk of the Circuit Court of Cook county, and demanded of him that he turn out the property named therein, and that Bidwell refused to do so; wherefore, being unable to find the property, the sheriff returned the writ not executed as to the within described property.

August 6, 1912, the plaintiff in this last mentioned suit, Anna B. Gilmore, filed her declaration in the Superior Court in replevin, joining counts in trover.

The defendant, Bidwell, pleaded a part of the above recited matters, and the plaintiff, Anna B. Gilmore, by replication set up the same and additional matter of fact and many matters or conclusions of law derived therefrom by her. To this replication the defendant, Bidwell, as clerk, etc., demurred generally and specially. For special causes of demurrer he alleged that the verdict before described made an adjudication

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against the plaintiff, Anna B. Gilmore, and her privies; that the plaintiff was,

“attempting in a collateral proceeding to attack the verdict of a jury, judgment of a court and orders of a court of concurrent jurisdiction with the Superior Court of Cook County, Illinois, in which suit the plaintiff herein was a party defendant, which verdict, judgment and orders are final and conclusive upon the plaintiff and involve the identical subject-matter involved in the suit at bar;”

that the plaintiff was attempting in a collateral proceeding to correct certain irregularities of form in a verdict and judgment of the Circuit Court of Cook county in a suit involving the identical subject-matter involved in the suit at bar, and to attack the jurisdiction of said Circuit Court in said case.

The Superior Court sustained the demurrer of the defendant, the plaintiff stood by her replication, judgment in the action was given for the defendant, the plaintiff appealed and the appeal is before this court for disposition.

JOHN T. BOOZ, for appellant.

BEACH & BEACH and FRANCIS S. WILSON, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

The facts set forth in the prefixed statement—facts alleged in the pleadings and admitted by the demurrer—are such that no argument, however ingenious and plausible, can conceal or controvert the truth of the proposition that what the Superior Court of Cook county was asked to do in the case at bar was not only to overrule the intent of the judgment and orders of a court of co-ordinate jurisdiction, but even to use the action of that court—contrary to its clear purpose—as a pretext for effecting a result which the Circuit Court supposed it had negatived. It can hardly be ex-

pected that this court will be astute to find reasons to compel the Superior Court to do so.

The administrator of the Place estate had a dispute with Anna B. Gilmore regarding the possession of and, presumably, the title to certain certificates of stock in an incorporated company, covering about 400,000 shares. He submitted the dispute to the Circuit Court of Cook county, bringing Anna B. Gilmore into that tribunal in a suit begun in replevin. There was a trial; a jury found expressly that "the right of possession of the property in question" was in the administrator of the Place estate, and assessed as damages "*for detention of said property*" the sum of one cent.

The Replevin statute says: "If judgment is given for the plaintiff in replevin, he *shall* recover damages for the detention of the property while the same was wrongfully detained by the defendant,"—a provision which sufficiently explains and accounts for the form of the verdict and the nominal damages.

On this verdict the Circuit Court entered a judgment. It was that "*the plaintiff*" (that is, the administrator aforesaid) "*do have and retain* the property replevied herein by virtue of the writ of replevin issued in said cause." There is also a provision that the plaintiff have and recover his damages "*of one cent in form as aforesaid* by the jury assessed."

The intention of both judge and jury in the Circuit Court to decide the dispute concerning the *right to possession* of the stock certificates at the time of the verdict and judgment, as well as at the time the suit was brought, is just as plain as though the property in question at the time had been in the possession of the sheriff under the replevin writ, or in the possession of the plaintiff to whom the sheriff had delivered it. It is hardly rendered plainer even by the order of the court at the time of the judgment from which an appeal was prayed and allowed, that the certificates should, until the further order of the court, be impounded with its clerk.

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But the appellant in the case at bar says the effect of these actions of the Circuit Court was to make her right to the certificates absolute, requiring only application to a court of co-ordinate jurisdiction to effectually vindicate it. Her argument is: "Because I refused to deliver the certificates to the Sheriff, (although I did thereafter to the Clerk) the administrator of Place must be conclusively presumed to have abandoned his replevin suit and by going on with the suit at all to have elected to proceed in trover,—inasmuch as he joined trover counts with the replevin ones in his declaration and the statute says that if the property is not found by or delivered to the Sheriff, the plaintiff *may* declare in trover, and if he recover therein shall be entitled to judgment for the value of his property. Then, since the plaintiff elected to proceed in trover, the verdict, contrary to its express words, must be considered a verdict in trover and the damages for the detention be considered an assessment of the value of the property, everything in the verdict to the contrary of this hypothesis to be considered a superfluity or an irregularity and negligible.

The judgment on this verdict is also to be considered as a judgment in trover, changing the title and vesting it in me, although said judgment is plainly in its form a judgment in replevin, just as the verdict was a verdict in replevin, and although the money part of it was purely nominal and although it was accompanied by an order impounding the certificates (which had appeared on the trial) with an officer of the Court.

That the end may crown the work, it is proposed to vindicate the legal right that the Circuit Court has thus, contrary to its undeniable intention, given to Anna B. Gilmore, by securing a judgment of the Superior Court in her favor in an action of replevin against an officer of the Circuit Court, and, as he has refused to deliver up the certificates, by mulcting him in their value (for the theory which Gilmore invokes

in *Devine v. Gilmore* must be good in *Gilmore v. Bidwell*) which we may suppose will be put at a much higher figure than one cent in the estimates of the plaintiff in *Gilmore v. Bidwell*.

The result aimed at is not agreeable to our sense of justice and we think the reasoning sophistical.

We are not prepared to hold that the plaintiff in *Devine, Adm'r v. Gilmore* "elected to proceed in trover" or that the verdict or judgment was in trover; and we are not of the opinion that the opinion in the criminal contempt case of *Yott v. People*, 91 Ill. 11, nor the decision in *McGavock v. Chamberlain*, 20 Ill. 219, that the plaintiff could not at the same time recover the value of some horses, the subject of a suit prosecuted in trover, and also damages for their detention, compels us to do so. The incidental language in the opinions in *Reno v. Woodyatt*, 81 Ill. App. 553, and *Rowersock v. Beers*, 82 Ill. App. 396, would not of course be binding or authoritative for us even were it more important.

The action in the Superior Court is an attempt not, as counsel argues, to render effective the judgment of a co-ordinate court, but to set it aside and overrule it. The only proper way to attack that judgment is by an appeal from a writ of error to the court which entered it. The Superior Court, on this ground if no other, was right in sustaining the demurrer to the plaintiff's replication in the case at bar and giving judgment for the defendant.

But there are other reasons why that action was right. We do not purpose to discuss the arguments made in the matter of the orders of Judge Tuthill under which the certificates are held by the clerk of the Circuit Court. We think that he received them and holds them in his official capacity under the order of the Circuit Court. Therefore replevin will not lie against him for them. If his holding is essentially wrongful, it should be ended by an application to the court which ordered it, or to some higher court, not to

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a co-ordinate one. As the Supreme Court of Kansas said in *Karr v. Stahl*, 75 Kan. 387: "Ample remedy has been given for testing the validity of any law, process or judgment without recourse to an action of replevin."

The judgment of the Superior Court is affirmed.

Affirmed.

Annie Curran, Appellee, v. Patrick B. Curran, Appellant.

Gen. No. 20,328. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Bill for divorce by Annie Curran against Patrick B. Curran for desertion and extreme and repeated cruelty.

The evidence showed, and it was admitted, that the husband left complainant on September 27, 1910, and never supported her nor offered to support her thereafter. The bill was filed May 23, 1913. The evidence as to the cause of his leaving was conflicting.

From a decree for complainant, respondent appeals.

PATRICK B. CURRAN and C. S. O'MEARA, for appellant.

KELLEY, FARDY & GRIFFIN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

The Philadelphia & Reading C. & I. Co. v. Kuecken, 191 Ill. App. 161.

Abstract of the Decision.

DIVORCE, § 48*—*when decree on ground of desertion sustained.* Where the evidence on a bill for divorce by a wife against a husband on the ground of desertion shows that the husband left her more than two years before the date of the filing of bill and never supported nor offered to support her thereafter, and the evidence as to the cause of his leaving is conflicting, a decree in favor of the complainant will not be disturbed on appeal.

**The Philadelphia & Reading Coal & Iron Company,
Plaintiff in Error, v. Adolf Kuecken et al., trading
as William Kuecken & Company, Defendants in
Error.**

Gen. No. 19,572.

1. PARTNERSHIP, § 252*—*when instruction as to liability of retiring members proper.* An instruction which tells the jury that as to a party with whom a copartnership had dealings, actual notice, or its equivalent, of the dissolution or the withdrawal of any member of the firm must be shown to protect the retiring members from liability for debts subsequently contracted, and that "proof of the mailing of the notice * * * properly addressed to persons having had prior dealings with the firm is prima facie evidence that the notices have been received by the parties to whom they were addressed, but such presumption may be rebutted by proof that the same notices were never received," *held proper.*

2. PARTNERSHIP, § 252*—*when question as to notice of dissolution and retirement of members for jury.* In an action to recover for coal sold to a copartnership after the withdrawal of certain members against whom the plaintiff sought to establish liability therefor, *held* under the evidence the question whether a notice of the dissolution and the withdrawal of the members was mailed to the plaintiff a year or more before the purchase of the coal was a question of fact for the jury, on which their verdict was conclusive.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Philadelphia & Reading C. & I. Co. v. Kuecken, 191 Ill. App. 161.

1913. Affirmed. Opinion filed January 25, 1915. Rehearing denied February 8, 1915.

ULLMAN, HOAG & DAVIDSON, for plaintiff in error.

HENRY D. COGHLAN, for defendants in error.

MR. JUSTICE BAKER delivered the opinion of the court. From 1902 to January, 1910, Adolf, Otto and Minnie Kuecken were copartners under the firm name of William Kuecken and Company, and during that time bought coal of the plaintiff corporation. In January, 1910, the copartnership was dissolved by the written agreement of the parties, and notice of such dissolution was given by publication in a newspaper. It was agreed by the parties that Otto Kuecken should thereafter continue the business under the former firm name. Plaintiff sold and delivered coal in January and February, 1912, to the person or persons doing business as William Kuecken and Company to the amount of \$319.10. Otto Kuecken was afterwards adjudged a bankrupt, and plaintiff sought in this action to recover the price of the coal so sold from Adolf and Minnie Kuecken. The jury found a verdict for the defendants, and this writ of error brings in review a judgment of *nil capiat* entered on the verdict.

The court instructed the jury that as to the plaintiff with whom the copartnership had had dealings, actual notice, or its equivalent, of the dissolution or the withdrawal of any member of the firm must be shown to protect the retiring member from liability for debts subsequently contracted, and that "proof of the mailing of the notice of dissolution of the partnership and of the retirement of certain members thereof, properly addressed to persons having had prior dealings with the firm is prima facie evidence that the notices have been received by the parties to whom they were addressed, but such presumption may be rebutted by proof that the same notices were never received."

We think the jury were properly instructed. *Meyer v. Krohn*, 114 Ill. 574; *Young v. Clapp*, 147 Ill. 176.

We also think that on the evidence in the record the question whether a notice of the dissolution of the copartnership and of the withdrawal of Adolf and Minnie Kuecken was mailed to the plaintiff in September, 1910, a year and longer before the purchase of the coal in question, was a question of fact for the jury, on which the verdict must be held conclusive.

We think the record is free from reversible error, and the judgment is affirmed.

Affirmed.

Hedwig Anna Schulze, Appellant, v. Anna Matschke et al., Appellees.

Gen. No. 19,777.

WILLS, § 478—when construed to charge legacies on certain realty. Language of a will held to disclose the intention of the testatrix to charge pecuniary legacies in favor of her grandchild upon real estate devised to children of testatrix.*

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed January 25, 1915.

ARTHUR SCHROEDER, for appellant.

AUGUST MARX, AUGUST R. MARX, CHARLES L. BARTLETT and SHERMAN C. SPITZER, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by Hedwig Anna Schulze from a decree sustaining the demurrers of the defendants to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topics and section number.

Schulze v. Matschke, 191 Ill. App. 163.

her bill of complaint as amended and dismissing the bill for want of equity.

The bill alleged that complainant was the only child of Emma Schulze, deceased, who was the daughter of Anna Zipp, who died January 31, 1901, leaving the following will:

"I, Anna Zipp, of the City of Chicago, Cook County and State of Illinois, being of sound mind and memory, do make, publish and declare this to be my last will and testament, hereby revoking all former wills.

"1st. I direct that my funeral expenses and just debts be paid.

"2d. I give, devise and bequeath to my beloved husband, John P. Zipp, all my personal property and household effects absolutely and forever.

"3d. I give, devise and bequeath to my beloved husband, John P. Zipp, all my real estate situated in the Village of Glencoe, Cook County, Illinois, absolutely and forever in fee simple.

"4th. I give, devise and bequeath to my beloved children, John P. Zipp, Jr., and Anna Matschke, the real estate known as Nos. 233, 235 and 237 Clybourn avenue, Chicago, Cook County and State of Illinois, in fee simple, provided, however, that my beloved husband, John P. Zipp, shall have the use, benefit, income and enjoyment thereof of said last mentioned real estate for and during his natural life. He to pay all taxes, assessments and improvements on said property.

"5th. I request that my children, John P. Zipp, Jr., and Anna Matschke, after the death of my husband, John P. Zipp, pay to my grandchild, Hedwig Anna Schulze, the sum of \$1,000 each, provided my grandchild, Hedwig Anna Schulze, is then living. In case of her death all obligations to pay to her the sum herein named shall terminate, and, further, that said sum shall not be paid to her until she is eighteen years of age. And in case she should die before she arrives at the age of eighteen years, said sum of \$2,000 to fall back to John P. Zipp, Jr., and Anna Matschke, my said children, in equal shares. I hereby devise and bequeath all the rest, remainder and residue of my real

estate, personal and mixed, to my beloved husband, John P. Zipp, and I hereby nominate and appoint my beloved husband executor of this will without security."

That John P. Zipp, Sr., died in 1906, intestate, leaving his children, Anna Matschke, John P. Zipp, Jr., and complainant, his grandchild, his only heirs at law.

That John P. Zipp, Jr., died in 1909, leaving Elizabeth P. Zipp, his daughter, his only heir at law.

The said Anna Zipp at the time of making her will and at the time of her death had no personal property and had only the real estate in the village of Glencoe and the premises Nos. 233, 235, 237 Clybourne avenue, mentioned in her will.

That the Clybourn avenue property is owned by Anna Matschke and Elizabeth P. Zipp, subject to certain liens, which it is unnecessary to state, and that the same is reasonably worth \$14,000.

The only question presented is whether an intent on the part of the testator to charge the legacies given by the will to complainant on the real estate devised to testator's children, John P. Zipp, Jr. and Anna Matschke, can be inferred under the facts and circumstances stated in the bill as amended.

It is further alleged in the bill that complainant has arrived at the age of eighteen, and that defendants Anna Matschke and Elizabeth Zipp have each failed and refused to pay her the sum of \$1,000. The prayer of the bill is that Anna Matschke and Elizabeth Zipp may be each decreed to pay complainant \$1,000; that she may be decreed to have a lien on their said real estate therefor; and that in default of payment the same may be sold, etc.

The court sustained the demurrers of defendants to the bill as amended and dismissed the same for want of equity, and from such decree the complainant prosecutes this appeal.

That it was the intention of Anna Zipp to give appellant \$2,000 if she arrived at the age of eighteen is clearly expressed.

"It is an elementary rule in the construction of wills, that effect must be given to that intention, if it can be done, consistently with the rules of law. In other words, this bequest must not be allowed to abate, unless it shall be found that, by no fair interpretation of the entire testamentary devise, can it be ascertained from what part of his estate the testator intended it should be paid, therefore, the only question here presented for decision is, can it be charged upon the real estate devised to appellees by the fourth or residuary clause? In determining that question it becomes important to ascertain, first, whether by the terms of the preceding clauses it can, consistently with the intention of said testator, be paid out of any other part of his estate." *Reid v. Corrigan*, 143 Ill. 402.

That it was not her intention to charge the real estate devised to her husband is clear, and we think it is also clear that she did not intend that the legacies should be paid out of her personal estate, for she bequeathed all her personal estate to her husband. *Reid v. Corrigan*, *supra*, p. 406.

One of two things must therefore follow: Either the legacies must abate and to that extent the will of the testator be defeated, or they must be paid out of the real estate devised to Anna Matschke and John P. Zipp, Jr., the father of Elizabeth P. Zipp. The clause of the will which provides that in case complainant shall die, "before she arrives at the age of eighteen years said sum of \$2,000 to fall back to John P. Zipp, Jr. and Anna Matschke, my said children, in equal shares," we think tends to show that the testator intended to charge the legacies on the real estate devised to Anna Matschke and John P. Zipp, Jr.

On a careful consideration of this case we are of the opinion that the testator intended these legacies to be paid out of the estate devised to Anna Matschke

Schiavone et al. v. Zingarelli et al., 191 Ill. App. 167.

and John P. Zipp, Jr. A similar conclusion was reached by the Supreme Court in *Reid v. Corrigan*, *supra*, and we think the language of the will in this case more clearly discloses such intention than does the will in that case. In that case it was said that the conclusion reached, "in no way conflicts with the rule of law announced in *Heslop v. Gatton, Ex'r*, 71 Ill. 528." The cases of *Wentworth v. Read*, 166 Ill. 139, and *Haynes v. McDonald*, 252 Ill. 236, only reannounce the rule stated in *Heslop v. Gatton*.

The decree of the Superior Court is reversed and the cause remanded with directions to overrule the demurrer to the bill as amended.

Reversed and remanded with directions.

Pasquale Schiavone and Michael F. Schiavone, trading as P. Schiavone & Son, Appellees, v. Donato Zingarelli and Amalia Zingarelli, Appellants.

Gen. No. 19,901. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. FREDERICK L. FAKE, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action by Pasquale Schiavone and Michael F. Schiavone, trading as P. Schiavone & Son, against Donato Zingarelli and Amalia Zingarelli upon certain notes given by defendants to one Bottigliero for work done on a certain building, the notes having been assigned to plaintiffs. The case was tried by the court without a jury. To reverse a judgment in favor of plaintiffs, defendants appeal.

MORGAN, McFARLAND & GOODMAN, for appellants.

Johnson v. Felchenfeld, 191 Ill. App. 168.

FREDERICK A. BROWN and WILLIAM B. T. EWEN, JR.,
for appellees; RAYMOND S. PRUITT and HARRY A. MC-
CAULEY, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 450***—*when erroneous admission of evidence not preserved for review.* The erroneous admission in evidence of a ledger leaf is not preserved for review, where it was offered, admitted in evidence and made a part of the record without objection, and afterwards counsel stated: "I think these three ledger leaves are objected to," which was not an objection, and no ruling of the court was asked or made.

2. **BILLS AND NOTES, § 326***—*when defense of failure of consideration not available.* Where the consideration for promissory notes was the promise of the payee to do certain work, the fact that the payee fails to keep his promise makes him liable for damages but does not constitute a failure of consideration which may be urged as a defense in a suit on the notes.

3. **BILLS AND NOTES, § 451***—*sufficiency of evidence.* In a suit to recover on promissory notes, held that there was not a clear preponderance of the evidence that there was an accounting or accord which would prevent a recovery.

**E. H. Johnson, Trustee, Defendant in Error, v. Arthur
Felchenfeld, Plaintiff in Error.**

Gen. No. 20,105. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action of forcible detainer in the Municipal Court of Chicago by E. H. Johnson, trustee of estate of T. F.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McKinley, bankrupt, against Arthur Feilchenfeld. To reverse a judgment entered on a directed verdict in favor of plaintiff, defendant prosecutes a writ of error.

The facts of the case were as follows: Hannah and Hogg rented from the owner in 1905 the entire floor of a building and about 1906 leased to the defendant a portion thereof 15x58 feet, which he has since occupied. In 1909 Hannah and Hogg leased to Flanigan a portion of said floor adjoining the premises occupied by defendant on the south and east for a term of five years from May 1, 1910. Flanigan, with the consent of the lessors, assigned his lease to Bloom January 19, 1910. Bloom leased to defendant March 5, 1910, a space about 15x25 feet adjoining on the east the premises leased to and occupied by defendant. September 12, 1910, Bloom, with the consent of the lessors, assigned the Flanigan lease to Lane. The lease of the space 15x25 feet made by Bloom to defendant appears to have been cancelled by consent of defendant and Lane, and Lane, August 4, 1911, leased to defendant a portion of the space leased by Bloom to defendant, approximately fifteen feet square, adjacent to the premises leased to defendant by Hannah and Hogg. April 27, 1912, Lane, with the consent of the lessors, assigned the Flanigan lease to Duggan. Duggan and McCarty occupied for a saloon the premises originally leased to Flanigan, with the exception of the 16x15 feet leased by Lane to defendant until in March, 1913, they lost their license. They paid the March rent and Hannah and Hogg sued Flanigan for the April, 1913, rent and recovered. April 16, 1913, Hannah and Hogg leased to plaintiff McKinley for a term of two years from May 1, 1913, the premises originally leased by said lessors to Flanigan.

This action was brought by McKinley to recover from Feilchenfeld possession of the space fifteen feet square adjoining on the east the premises 15x58 feet

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originally leased by Hannah and Hogg to defendant. It appeared that the court directed a verdict for the plaintiff on the theory that the lease to Flanigan had been forfeited and that therefore the lease from Lane to defendant for the premises in controversy had become void and of no effect. The lease to Flanigan provides that:

"It is expressly agreed between the parties that, if default be made in the payment of the rent above reserved or any part thereof, or in any of the covenants and agreements herein contained, to be kept by the second party, it shall be lawful for the first party, or the legal representatives of said party, at any time thereafter, at the election of said first party, or the legal representatives thereof, without notice, to declare said term ended, and to re-enter said demised premises, or any part thereof, either with or without process of law, and the said second party, or any person or persons occupying the same, to expel, remove and put out, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants. * * *

And in order to enforce a forfeiture for non-payment of rent, it shall not be necessary to make a demand on the same day the rent shall become due, but a failure to pay at the place aforesaid, or a demand and a refusal to pay on the same day, or at any time on any subsequent day, shall be sufficient, and shall be deemed a forfeiture for non-payment of rent; and after such default in forfeiture shall be made, the second party and all persons in possession under him shall be deemed guilty of a forcible detainer of said premises under the statute."

SOBOROFF & NEWMAN, for plaintiff in error; SAMUEL W. NEWMAN, of counsel.

Herrmann v. Ernst et al., 191 Ill. App. 171.

No appearance for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 416*—*when provision of forfeiture for nonpayment of rent binding on sublessee.* Provisions in a lease held to exact a forfeiture of the lease for nonpayment of the rent by the lessee when due, and to be binding on a sublessee so that an action of forcible detainer would lie against the latter on simple proof of the lessee's nonpayment of the rent.

2. LANDLORD AND TENANT, § 465*—*effect of payment of rent after forfeiture of lease.* The payment after forfeiture of lease of rent accruing before forfeiture does not affect the forfeiture in the absence of any facts connected with the payment tending to show a waiver of such forfeiture.

Wilhelmine Herrman, Defendant in Error, v. Anton Ernst and Margaretha Ernst, Plaintiffs in Error.

Gen. No. 18,583. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. Judson F. Goins, Judge, presiding. Heard in this court at the October term, 1912. Affirmed upon remittitur; otherwise reversed and remanded. Opinion filed January 25, 1915.

Statement of the Case.

Action by Wilhelmine Herrmann against Anton and Margaretha Ernst to recover for personal injuries received by plaintiff from being bitten by a dog belonging to defendants. To reverse a judgment entered on a verdict for two hundred dollars, defendants prosecute a writ of error.

Q. J. CHOTT, for plaintiffs in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

No appearance for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. ANIMALS, § 46*—*when recovery for dog bite excessive.* A verdict for two hundred dollars for injuries sustained by a dog bite, *held* excessive to the extent of one hundred dollars, where it appeared plaintiff received a small bite on the leg which healed without delay.

2. ANIMALS, § 43*—*sufficiency of evidence.* In an action to recover for an injury resulting to plaintiff from a bite by defendants' dog, where plaintiff claimed she was bitten by the dog which was chained near the entrance of defendants' building when she went upon the premises to inquire concerning rooms for rent, and defendant asserted nonliability on the ground that plaintiff was a trespasser and also guilty of contributory negligence, *held* that a finding for plaintiff was sustained by the evidence.

**Henry L. Steinke, Plaintiff in Error, v. Julius Eisner,
Defendant in Error.**

Gen. No. 19,001. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAVERLY, Judge, presiding. Heard in this court at the March term, 1913. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action by Henry L. Steinke against Julius Eisner to recover for money loaned and merchandise sold and delivered. Upon a trial without a jury, the testimony of plaintiff in support of his claim was contradicted categorically as to each item by the testimony of de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Saltonstall v. Mead et al., 191 Ill. App. 173.

fendant. To reverse a judgment entered on a finding in favor of defendant, plaintiff prosecutes a writ of error.

FRANK FOSTER, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 286a*—*necessity of argument*. It is not error for the court trying a case without a jury to render a decision without requiring argument of counsel.

2. APPEAL AND ERROR, § 989*—*when disallowance of motion for nonsuit not presented for review*. Refusal of court to allow a motion to be made for a nonsuit is not presented for review where it does not appear from the record any attempt to make such a motion was made.

Richard M. Saltonstall et al., Plaintiffs in Error, v.
George H. Mead and The George H. Mead Agency,
Inc., Defendants in Error.

Gen. No. 19,718. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK C. GRAHAM, Judge, presiding. Heard in this court at the October term, 1913. Reversed and judgment here with finding of fact. Opinion filed January 25, 1915.

Statement of the Case.

Action of distress for rent, brought in the Municipal Court of Chicago by Richard M. Saltonstall and others

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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against George H. Mead and The George H. Mead Agency, Inc. The defense was that the property levied upon was the sole property of The George H. Mead Agency, a corporation, and that no relation of landlord and tenant existed between this Company and the plaintiffs. Upon trial without a jury the court found against the plaintiffs on the issue as to the right to levy the distress warrant and dismissed the suit as to The George H. Mead Agency. On the same date on which the distress warrant was levied the Mead Agency commenced replevin proceedings, in which the goods levied upon in the distress proceedings were delivered to it. By a stipulation both the distress proceedings and the replevin suit were heard by the judge of the Municipal Court to whom the distress proceeding had been assigned, the evidence being the same in both cases. The court found in the replevin suit that the right of possession in the property was in The George H. Mead Agency, the plaintiff.

This writ of error is prosecuted by plaintiff to reverse the judgment of the court in the action for distress for rent. A writ of error was also prosecuted to reverse the judgment in the replevin suit. See *The George H. Mead Agency v. Saltonstall*, p. 176, *post*.

The facts of the case were substantially as follows: In January, 1911, the premises occupied by defendant were leased to George H. Mead by a written instrument for a term beginning May 1, 1911, and ending April 30, 1914. At the time of making this instrument George H. Mead occupied an office on the seventh floor of the same building (the Marquette Building), where he was engaged in the advertising business under the name of The George H. Mead Agency. In February, 1911, he caused his business to be incorporated under the same name, to wit, The George H. Mead Agency. In this corporation George H. Mead subscribed for all of the capital stock except two shares, which were subscribed for by other persons but not paid for. By

a resolution George H. Mead turned over to The George H. Mead Agency in payment of his subscription to its capital stock a certain amount of cash and the "assets and good will of the business heretofore conducted by me under the name of The George H. Mead Agency." Among these assets was the office furniture which was subsequently levied upon by the plaintiffs in this proceeding. The resolution further provided that the corporation was to assume all bills payable, consisting of the current bills. On or about May 1, 1911, Mead and the corporation took possession of the demised premises and the business was conducted as before, but under the name of "The George H. Mead Agency, Inc.," of which George H. Mead was the president and general manager. No other officers of the corporation or employees occupied or used any portion of the demised space. The monthly rental under the lease was thereafter paid regularly and continuously for some time by The George H. Mead Agency through its checks.

ALLEN G. MILLS, for plaintiffs in error.

No appearance for defendants in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

LANDLORD AND TENANT, § 366*—*when property of corporation organized by lessee subject to distress for rent.* Where a person leased premises for his business in his individual name, and thereafter incorporated his business, subscribed for nearly all the capital stock, and conducted the business on the premises as president and general manager and paid the rent through the checks of the corporation, *held* that the conduct of the parties constituted an acceptance by the corporation of the lease and that it became bound by provisions thereof so that its office furniture might be seized under a distress warrant for rent.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The George H. Mead Agency v. Saltonstall, 191 Ill. App. 176.

**The George H. Mead Agency, Defendant in Error, v.
Richard M. Saltonstall et al., Plaintiffs in Error.**

Gen. No. 19,719. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK C. GRAHAM, Judge, presiding. Heard in this court at the October term, 1913. Reversed. Opinion filed January 25, 1915.

Statement of the Case.

This case is the replevin suit referred to in the statement of facts in the case of *Saltonstall v. George H. Mead and The George H. Mead Agency, Inc.*, reported on p. 173, *ante*, and the decision in that case held controlling.

ALLEN G. MILLS, for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

American Credit & Trust Company, Appellee, v. John Worthington, trading as American Bank, Appellant.**Gen. No. 19,940.**

1. CORPORATIONS, § 344*—*when question of ultra vires cannot be raised.* Where an act of a corporation is at most only an abuse or excessive use of a general power conferred by its charter, in a suit by the corporation to enforce its rights with reference thereto, the question of *ultra vires* cannot be raised by the defendant, but can be raised only in a direct proceeding by the State.

2. CORPORATIONS, § 344*—*when right to purchase certificates of deposit cannot be questioned by plea of ultra vires.* Where a corporation has power under its charter to buy and hold property of any kind except real estate and corporate stock, and to borrow money, etc., a purchase by it of certificates of deposit is not wholly without the scope of its powers, and in a suit by it to recover on the certificate a plea of *ultra vires* cannot be maintained.

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed January 25, 1915.

ADAMS, CREWS, BOBB & WESCOTT, for appellant.

FRANK SOHORNFELD, for appellee; GEORGE F. ORT, of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

This is an action in assumpsit to recover on two certificates of deposit dated July 9, 1912, payable to the order of J. F. Conant, each for the sum of \$1,000, due six months after date with interest. There was a verdict and judgment for plaintiff for \$2,040, from which judgment defendant has appealed.

It seems to have been proven that the certificates were executed and delivered on their dates by defendant to Conant; that subsequently, before maturity, they

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Credit & Trust Co. v. Worthington, 191 Ill. App. 177.

were acquired by indorsement and delivered in the ordinary course of business, for value, to Wolff Adolphus, who in the same manner, after maturity, sold and transferred them for value to plaintiff.

The main question urged upon our consideration is raised by the plea of *ultra vires*. It is said that the plaintiff, a corporation formed under the general incorporation law, cannot engage in banking and the business of loaning money (chapter 32, sec. 1, R. S. 1911, J. & A. ¶ 2418), and it is contended that when plaintiff acquired the certificates in the manner it did, it by that act was engaged in the prohibited business of banking and loaning money. Hence it is argued plaintiff cannot maintain this action.

We do not think it necessary for us to determine whether this act of acquiring the certificates was the exercise of the function of banking or was, in the eye of the law, loaning money. Neither is it necessary to inquire as to the absolute legal integrity of this transaction. It is sufficient for us to consider its character under the powers granted by charter, only so far as is necessary to determine whether defendant will be permitted to question it in this suit. The law is that if the act in question is unauthorized under any circumstances, the plea of *ultra vires* by a defendant in such a case as this may be successfully maintained, but if the act is at most only an abuse or excessive use of a general power conferred by charter, the question of *ultra vires* cannot be raised by the defendant in such a case but it can be raised only in a direct proceeding by the State to oust the corporation. This has been so clearly held in the following cases as to require no further statement. *In re Humphrey Advertising Co.*, 101 C. C. A. 1, 177 Fed. 187; *Rector v. Hartford Deposit Co.*, 190 Ill. 380; *Western Telephone Mfg. Co. v. Foley*, 150 Ill. App. 343; *Chicago Building Society v. Crowell*, 65 Ill. 453; *McIntire v. Preston*, 10 Ill. 48. We find in the cases from our Supreme Court cited by defendant's counsel nothing in conflict or inconsistent with

this view. Turning then to the power conferred by its charter upon this plaintiff we find that it has power to "buy, hold and own books, pianos, furniture, machinery and property, except real estate, and corporate stock, of any and every kind and description, to borrow money, assign, mortgage, pledge or otherwise charge any or all property rights owned or held by this corporation, to issue corporate obligations, to secure the payment of moneys, borrow and do a general brokerage commission, manufacturing and merchandise business." With these powers, and particularly with the authority to buy and hold "property * * * of any and every kind and description," it is self-evident that there is no merit in the claim that the purchase of these certificates was wholly without the scope of the powers conferred by charter, and unauthorized under any and all circumstances. At most it might possibly be claimed to have been an excessive use of power, but even this is not wholly free from doubt. We are of the opinion that this case falls within the rule announced above and that under the decisions there cited this defendant cannot be permitted in this suit to question the power of plaintiff to acquire these certificates and to bring suit thereon.

Under the evidence and the law the verdict was proper and the judgment is affirmed.

Affirmed.

Smith v. Chicago City Ry. Co., 191 Ill. App. 180.

**Edward Smith, Defendant in Error, v. Chicago City
Railway Company, Plaintiff in Error.**

Gen. No. 20,052. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action by Edward Smith against Chicago City Railway Company to recover for personal injuries received by plaintiff when a wagon he was driving was struck by one of defendant's cars. Plaintiff had verdict and judgment for nine hundred dollars. To reverse the judgment, defendant prosecutes a writ of error.

The place of the accident was at the intersection of a north and south street and an east and west street, and a street running northeasterly and southwesterly. Plaintiff was driving a loaded wagon north on the first mentioned street and when he reached the intersection he attempted to cross the street car tracks of defendant for the purpose of turning west on the second named street on which a car was approaching from the west. There was evidence tending to show that when plaintiff started to cross the tracks the street car was about two hundred or three hundred feet away coming at full speed and that it did not slacken until it struck the wagon. There was also testimony that no bell or gong was sounded and that the car ran by the point at the intersection where passengers were waiting to board the car.

A. C. WILD, for plaintiff in error; LEONARD A. BUSBY, WARNER H. ROBINSON and WARREN D. BARTHOLOMEW, of counsel.

JOHN STELK, for defendant in error; JAMES D. POWER, of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 133*—*when negligence and contributory negligence questions for jury.* In an action against a street railway company for personal injuries resulting from a collision between a wagon he was driving and one of defendant's cars at a street intersection, *held* under the evidence that the question whether plaintiff was guilty of contributory negligence and whether defendant was guilty of negligence was for the jury, and that a verdict for plaintiff was sustained by the evidence.

2. DAMAGES, § 115*—*when recovery for personal injuries not excessive.* A verdict for nine hundred dollars for personal injuries *held* not excessive, when it appeared that plaintiff was thrown from his wagon and was apparently unconscious for a time, that there was an injury to his chest and knee, that he was confined to his bed for thirty days, that the knee was badly swollen and that certain functional disorders appeared which gradually diminished.

3. DAMAGES, § 188*—*sufficiency of evidence to prove disorders resulting from accident.* In an action for personal injuries, it is not necessary to prove disorders resulting from the accident by direct and specific evidence that the injury produced the ailments or how the injury produced them; it is proper practice to prove the condition of plaintiff's health at and prior to the time of the accident and to follow that up by proof showing the physical condition after the injury, and leave it to the jury to determine the cause of the subsequent physical condition as a question of fact.

4. WITNESSES, § 220*—*limits of cross-examination.* In an action for personal injuries, a question put to a physician with reference to the existence of ailments which he could not see, *held* to be within the reasonable limits allowed by cross-examination.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rees v. Johnson, 191 Ill. App. 182.

**Louis Rees, Plaintiff in Error, v. Carl S. Johnson,
Defendant in Error.**

Gen. No. 20,167.

1. EVIDENCE, § 352*—*admissibility of parol evidence to explain patent ambiguities.* Though a latent ambiguity in a written contract may be explained by parol evidence, a patent ambiguity cannot be so explained.

2. VENDOR AND PURCHASER, § 27*—*when contract nonenforceable for patent ambiguity as to price.* Where one provision of a contract for the sale of real estate showed the price to be \$10,000 and another provision showed the price to be \$5,000, *held* that the contract was patently ambiguous and therefore could not be the basis of an action for damages for an alleged breach thereof.

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed January 25, 1915. Rehearing denied February 8, 1915.

MOSES, ROSENTHAL & KENNEDY, for plaintiff in error;
JULIUS MOSES and ARTHUR E. MANHEIMER, of counsel.

JOHN C. TRAINOR, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

This is a suit for damages for the alleged breach of a written contract concerning the sale of real estate. This contract is as follows:

“CHICAGO, Aug. 5th, 1910:

Received of L. Rees Five Hundred and no/100 (\$500.00) dollars as deposit on sale of building known as 10901 Mich. Ave. located at corner of Mich. Ave. & 109th St. to be sold for (\$10,000.00) Ten Thousand dollars clear of all expense, the building to be turned over clear of all claims except (\$5,000) Five Thousand dollars first mortgage. Fifteen Hundred (\$1500.00) dol-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

lars to be paid on the first day of September, 1910 and the balance, Three Thousand (3000.00) dollars to be paid the 2nd day of January, 1911.

C. S. JOHNSON,

L. REES

Witness, CARL G. JOHNSON."

Plaintiff, Rees, alleged the subsequent failure and refusal of the defendant to perform his promises under the contract, and claimed as damages the difference between the market price and what plaintiff says is the contract price. Upon trial the jury returned a verdict finding the issues against the plaintiff, upon which judgment was entered.

The plaintiff upon the trial claimed that the contract was ambiguous as to the property to be sold, and testimony was heard to the effect that it was the intention of the parties to contract for the sale not only of the "building" but also the lot upon which it stood, including another building located on the lot. The defendant, in his turn, claimed that the contract was ambiguous as to the interest to be sold and, over the objections of plaintiff, introduced testimony to the effect that he was the owner of only a one half interest in the property, the other half being owned by his wife, that this was known to the plaintiff, and that it was the intention of the parties by this instrument to contract with reference only to defendant's half interest in the property.

The presence of these ambiguities may be conceded by us, and there are persuasive reasons for considering them to be latent ambiguities which parol testimony is admissible to explain, but we are of the opinion that there is also present in this contract a patent ambiguity as to the purchase price. The first provision as to price is, "to be sold for (\$10,000.00) Ten Thousand dollars clear of all expense, * * * to be turned over clear of all claims except (\$5,000) Five Thousand dollars first mortgage." Standing alone this means that the seller is to receive \$10,000, the buyer to take the

Rees v. Johnson, 191 Ill. App. 182.

property subject to a \$5,000 mortgage; as it would be ordinarily understood and expressed, the seller is to receive \$10,000 for his equity. Provisions like this have been in such constant use in a very large number of transactions in this county that there is no room for reasonable difference of opinion as to their meaning.

The next provision is as follows: "Fifteen Hundred (\$1500.00) dollars to be paid on the first day of September, 1910 and the balance, Three Thousand (3000.00) dollars to be paid the 2nd day of January, 1911." Bearing in mind the cash payment of \$500, this provision can mean only one thing, namely, a sale of the equity for \$5,000, and hence there is a direct conflict with the prior provision; that the buyer is to take the property subject to the \$5,000 mortgage is certain, but whether the seller is to receive for his equity \$10,000, as agreed upon in the first provision, or \$5,000, as agreed upon in the second provision, is patently uncertain.

In Parsons on Contracts, secs. 558-559, the author quotes from Lord Bacon thus: "There be two sorts of ambiguities of words; the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain, and without ambiguity, for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." And the comment of the author is that "the rules of Lord Bacon rest entirely upon the principle that the law will not make, nor permit to be made, for parties, a contract other than that which they have made for themselves." It is a legal maxim that "a patent ambiguity cannot be cleared up by extrinsic evidence." 2 Cyc. 278. In *Panton v. Tefft*, 22 Ill. 367, the court held that parol evidence is inadmissible to explain a patent ambiguity, saying: "While a *latent* ambiguity may be so explained, it is because it is made to appear by evidence outside of the

instrument, yet a patent ambiguity is not susceptible of any other explanation than that furnished by the instrument itself."

It is obvious that any parol testimony tending to show that it was intended that the equity in the property in question should be bought and sold for \$5,000 would tend to vary and contradict that provision of the contract which, as we have seen, provides that it should be bought and sold for \$10,000; and equally is it true that testimony tending to establish the price named in the first provision would tend to contradict and vary the price named in the second provision of the contract. It follows, therefore, that a contract for the sale of property, patently ambiguous as to the price, cannot be the basis of an action for damages for its alleged breach. "No contract will be enforced, as a contract, if it have no plain and natural or legal meaning, by itself; * * * the supposed contract being set aside for such reasons as these, the parties will be remitted to their original rights and obligations." 2 Parsons on Contracts, sec. 566.

In the case before us, plaintiff cannot recover damages on the contract. While we are not prepared to approve all the rulings on the evidence upon the trial, or the instructions to the jury, yet, as under our construction of the contract and the law applicable thereto there can be no recovery in this case, we shall not disturb the judgment, which was favorable to the defendant. We do not wish to be understood as indicating any opinion as to the right of plaintiff to recover the \$500 earnest money paid by him, in a proper suit. For the reasons above indicated the judgment is affirmed.

Affirmed.

Goyt v. National Council, K. & L. of Security, 191 Ill. App. 186.

**Andrew Goyt, Plaintiff in Error, v. National Council,
Knights and Ladies of Security, Defendant in Error.**

Gen. No. 20,381. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 25, 1915.

Statement of the Case.

Action by Andrew Goyt against the National Council, Knights and Ladies of Security, a corporation, on a benefit certificate issued by the defendant on the life of plaintiff's wife. The original certificate was issued December 19, 1900, and was at that time payable \$700 to the husband and \$300 to Elizabeth Spring, the mother of Mrs. Goyt. On August 27, 1908, the original certificate was returned to the defendant with a request from Mrs. Goyt to have the benefits all made payable to the plaintiff, thus leaving out the mother. Mrs. Goyt had been declared insane by the County Court on April 21, 1908, and this finding was in force when the certificate was changed. At the death of Mrs. Goyt the plaintiff claimed the entire proceeds of the certificate. Elizabeth Spring claimed the amount provided in the first certificate, on the ground that the insured was insane when the beneficiary was changed. The face value of the certificate at the time of the death of Mrs. Goyt was \$960. Plaintiff would not accept as full settlement \$672, being his proportion of the original certificate, and brought this suit for the whole amount.

The case had been tried twice. Upon the first trial the trial court directed a verdict for plaintiff, but this was held to be reversible error by the Branch Appellate Court, in 178 Ill. App. 377. Upon the first trial it was claimed by plaintiff that the issuance of the second certificate, changing the beneficiary, was a new

Goyt v. National Council, K. & L. of Security, 191 Ill. App. 186.

contract, and also that the defendant could not set up as a defense that Mrs. Goyt was insane. The Appellate Court held against plaintiff on both these propositions. The court also held that the evidence introduced by the defendant made at least a *prima facie* case that Mrs. Goyt was not sane at the time the change was made and that the burden of proof was thus shifted to the plaintiff to show that the change was made during a lucid interval. The law of the case being thus settled adversely to the contentions of plaintiff, the issue tried before the jury on the second trial was as to the sanity of Mrs. Goyt on August 27, 1908, at the time she directed defendant to issue the new certificate. The jury was of the opinion from consideration of the evidence before it that she was without sufficient mental understanding to transact business at this time, and a verdict adverse to plaintiff was returned upon which judgment was entered. To reverse the judgment, plaintiff prosecutes error.

CHARLES R. NAPIER and CHARLES S. McILVAINE, for plaintiff in error.

A. W. FULTON, for defendant in error.

MR. JUSTICE McSURNLY delivered the opinion of the court.

Abstract of the Decision.

INSANE PERSONS, § 5*—*when finding as to sanity of member of benefit society sustained by evidence.* In an action on a benefit certificate issued by a benefit society on the life of plaintiff's wife, where the issue was whether plaintiff's wife was sane or insane when she requested a change of beneficiaries, a finding of the jury that she was insane, *held* sustained by the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Segal v. Goldberg, 191 Ill. App. 188.

Solomon Segal, Defendant in Error, v. Joseph Goldberg, Plaintiff in Error.

Gen. No. 18,497. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 26, 1915.

Statement of the Case.

Action by Solomon Segal against Joseph Goldberg for the return of \$350 alleged to have been deposited with defendant under the terms of a lease by which said sum was to be held by defendant, as lessor, until the termination of said lease as security for the purpose of indemnifying the lessor for the removal of the front of the building, and was to be returned with three per cent. interest per annum unless the lessee failed to restore the said front "at the expiration of the lease," in which event it was to be retained as fixed and liquidated damages. The lease also provided for a penalty of \$10 each day the tenant held over. The case was tried before the court without a jury and there was a finding and judgment in favor of plaintiff for \$235. To reverse the judgment, defendant prosecutes a writ of error.

The testimony tended to show that at the expiration of the lease, the lessee offered to make the restoration but was deterred from so doing by the lessor, that the cost of restoration would have been \$150, and that the lessee surrendered the keys five days after the lease expired. The court evidently arrived at its finding by deducting from the amount of the deposit and three per cent. interest thereon to the date of the expiration of the lease the estimated cost of restoring the building and \$50 for holding over, thus leaving \$200, on which the statutory interest to the date of judgment was \$35.

City of Chicago v. Allen, 191 Ill. App. 189.

HARRY BROWN, for plaintiff in error; L. M. ACKLEY,
of counsel.

DOUGLAS C. GREGG, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion
of the court.

Abstract of the Decision.

DAMAGES, § 85*—*when deposit under terms of lease treated as penalty.* A deposit made by the lessee with the lessor which by the terms of the lease was to be retained by the lessor in case the lessee failed to restore the front of the building at the expiration of the lease, *held* properly treated by the court as a penalty rather than liquidated damages in a suit to recover it, where the only competent evidence on the estimated cost of restoring the building was offered by plaintiff, from the nature of which it appeared the cost could be computed with approximate certainty.

City of Chicago, Plaintiff in Error, v. E. H. Allen,
Defendant in Error.

Gen. No. 20,006. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. DAVID SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the April term, 1914. Affirmed. Opinion filed January 26, 1915.

Statement of the Case.

Prosecution by the city of Chicago against E. H. Allen in which defendant was charged with disorderly conduct in violation of a city ordinance. Upon a trial by the court without a jury defendant was acquitted. To reverse the judgment, plaintiff prosecutes a writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Allen, 191 Ill. App. 189.

The same charge was also preferred and prosecuted at the same time against one Charles E. Selleck, growing out of the same occurrence and with the same result. The evidence and questions being the same, both cases were consolidated in the Appellate Court for hearing. For the decision of the court on the writ of error sued out by Charles E. Selleck, see *City of Chicago v. Selleck*, p. 191, *post*.

WILLIAM H. SEXTON and JAMES S. McINERNEY, for plaintiff in error; ALBERT J. W. APPELL, of counsel.

FRANCIS E. CROARKIN, for defendant in error; FRANCIS W. WALKER, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. DISORDERLY CONDUCT, § 1*—*when finding of not guilty sustained by evidence.* On a prosecution for disorderly conduct in violation of a city ordinance, a finding of not guilty held not contrary to the evidence where the weight thereof depended mainly upon the credibility of witnesses.

2. APPEAL AND ERROR, § 472*—*when limiting number of witnesses not preserved for review.* Action of court in limiting the number of witnesses, held not preserved for review, where no objection was taken to the court's suggestion to that effect, but on the contrary it appeared that counsel appeared to have acquiesced in it.

3. APPEAL AND ERROR, § 1512*—*when action of court in taking judicial notice of character of place witness worked not reversible.* In a prosecution for disorderly conduct, the fact that the court improperly took judicial notice of the bad character of a place in which one of the witnesses at one time worked, held not reversible error, where the material fact in controversy was as to who were the aggressors in the fight.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago, Plaintiff in Error, v. Charles A. Selleck, Defendant in Error.

Gen. No. 20,007. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. DAVID SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the April term, 1914. Affirmed. Opinion filed January 26, 1915.

Statement of the Case.

This case was consolidated for hearing with the case of *City of Chicago v. Allen*, reported on p. 189 *ante*, and the decision in that case held controlling in this.

WILLIAM H. SEXTON and JAMES S. MCINERNEY, for plaintiff in error; ALBERT J. W. APPELL, of counsel.

FRANCIS E. CROARKIN, for defendant in error; FRANCIS W. WALKER, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Yuckman v. Considine, 191 Ill. App. 192.

**A. Yuckman, Defendant in Error, v. J. J. Considine,
Plaintiff in Error.**

Gen. No. 20,103. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 22, 1914. Rehearing allowed and additional opinion filed January 26, 1915.

Statement of the Case.

Action by A. Yuckman against J. J. Considine to recover commissions claimed to have been earned by him under a verbal agreement with the latter to procure a purchaser ready, willing and able to buy certain real estate owned by defendant's mother.

Plaintiff claimed that defendant agreed to pay him two and one-half per cent. commission, and that the parties he was negotiating with subsequently accepted defendant's terms but defendant would not close the deal. On the other hand, defendant claimed that on plaintiff's first visit he told him the property was for sale, and that his mother and not he was the owner thereof; that after the offer aforesaid was rejected, plaintiff requested him to see if his mother would not take a less sum, and that he did not see plaintiff thereafter until he came claiming a commission.

Three important matters were in dispute: (1) The terms of sale; (2) whether defendant personally promised to pay a commission fee; (3) whether he held himself out as the owner or as authorized to sell.

In an instruction on the last matter the Court said:

"The question of ownership of the property is altogether immaterial; that is, if you should find from the evidence in the case that the defendant held himself out to be the duly authorized agent of the owner of the property, and that he had the proper authority to sell

Yuckman v. Considine, 191 Ill. App. 192.

this property, then he would be liable whether or not he owned the property.”

Thereupon defendant requested the Court to instruct as follows:

“The court instructs the jury that if you find from the evidence that the defendant, J. J. Considine, was not the owner of the real estate in question, and was not authorized by the owner thereof to sell or offer the same for sale, and that the plaintiff had knowledge of this fact prior to or at the time he began negotiations with the prospective purchasers, he cannot recover, and your verdict must be for the defendant.”

The court refused so to instruct the jury and defendant excepted thereto and to that part of the given instruction saying that the ownership was immaterial. To reverse a judgment in favor of plaintiff, defendant prosecutes error.

JOSEPH P. MAHONEY, for plaintiff in error; HOWARD M. HARPEL and J. KENTNER ELLIOTT, of counsel.

ADLER & LEDERER, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 95*—*when instructions misleading.* In an action to recover brokerage commissions for procuring a purchaser ready and able to buy real estate belonging to defendant's mother, an instruction given for plaintiff telling the jury that the question of ownership of the property was “altogether immaterial,” *held* misleading when the controverted issues of fact were whether plaintiff did not know that defendant was acting merely as agent of the owner in the transaction, and whether defendant made any personal promise to pay the commissions.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sell v. Fisk, 191 Ill. App. 194.

Harry A. Sell, Appellant, v. Charles H. Fisk, Appellee.

Gen. No. 20,273. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 26, 1915.

Statement of the Case.

Action by Harry A. Sell against Charles H. Fisk to recover damages for personal injuries. At the close of plaintiff's case the court, on motion of defendant, excluded the testimony and directed a verdict because of the insufficiency of the declaration. To reverse a judgment entered on the verdict, plaintiff appeals.

ALBERT H. FREY, for appellant.

BRUNDAGE, LANDON & HOLT, for appellee; ROBERT N. HOLT, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 212*—*insufficiency of pleadings as ground for direction of verdict.* The insufficiency of the declaration cannot be tested on a motion to direct a verdict, even though it is fatally defective, for by pleading to the merits the defendant admits its sufficiency and elects to proceed to the trial of an issue of fact. The fact that a defendant by pleading does not waive substantial defects in the declaration and may take advantage thereof by a motion in arrest of judgment does not affect the rule.

2. NEGLIGENCE, § 204*—*right to direction of verdict.* Where plaintiff's exercise of due care becomes a question of fact for the jury, a directed verdict for defendant is improper even though the declaration did not allege the exercise of due care, since the verdict might cure such defect.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Peter L. Flodin, Appellee, v. W. H. Lutes Company,
Appellant.**

Gen. No. 20,334.

1. SALES, § 373*—*sufficiency of evidence*. Evidence held sufficient to show that the seller of notes was the ostensible owner thereof, that they were sold for an undisputed amount upon condition that it would repurchase them on the buyer's request, and that the seller, after request duly made, failed to comply with such promise.

2. CORPORATIONS, § 370*—*when cannot question authority of president to make a conditional sale of notes*. Where a corporation through its president sold notes and received the money paid therefor, it is in no position to question the authority of its president to sell the notes or the validity of his agreement to repurchase them, where the transaction appears to have been in furtherance of its corporate interests.

3. CORPORATIONS, § 412*—*power to make conditional sale of notes*. Where a sale of notes is made by a corporation to obtain money for corporate purposes, there is an implied and incidental power to make the sale conditional upon an agreement for repurchasing the notes.

4. APPEAL AND ERROR, § 966*—*when no question of law presented for review*. Abstract of the record held to present no question of law but only a question whether the evidence was sufficient to sustain the trial court's finding, where it did not show any objections to the rulings on the evidence or that any propositions of law were submitted, and the only motion made during the progress of the trial was a motion at the close of the plaintiff's case to find for defendant.

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 26, 1915. *Certiorari* denied by Supreme Court (making opinion final).

MATHER & HUTSON, for appellant; WILLIAM A. SHEEHAN, of counsel.

BRECHER & CHINDBLOM, for appellee; LAMBERT KASPER, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Flodin v. W. H. Lutes Co., 191 Ill. App. 195.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Appellant sold certain laundry machinery to a firm composed of one Haynes and one Hennessey. They paid part of the account and gave appellant their promissory notes for the balance, aggregating \$2,065, payable to appellant's order and secured by a chattel mortgage on the property sold. Later Flodin, appellee, became a partner of Haynes and Hennessey and purchased the above notes through negotiations with W. H. Lutes, president of appellant, on condition, as he claims, that appellant would, on his request, repurchase them on the same terms on which they were sold. The agreement, whatever it was, was oral. A few months later he returned the notes to said Lutes and demanded compliance with the agreement, the nature and character of which does not at that time appear to have been discussed or questioned. Later, appellant failing to comply therewith, this suit was brought upon appellant's alleged promise to repurchase.

The case was tried before the court without a jury and there was a finding and judgment in favor of appellee for \$2,101.90.

The defense set up in appellant's amended affidavit of merits was that it did not deliver the notes to plaintiff for a valuable consideration; that it did not receive the amount therefor claimed by plaintiff; that it made no agreement to repurchase the notes; that no tender of them was made, and that the promise made was made by Lutes in his personal capacity, and if made by an agent of the company was *ultra vires* and not binding on it. Except as to the last mentioned ground of defense, the issues thus raised were wholly as to questions of fact.

We have thoroughly examined the evidence, documentary and otherwise, covering sixty-nine pages of the abstract and two hundred sixty-nine pages of the

record, and deem it unnecessary to discuss the controverted facts in detail. The evidence was abundantly sufficient, we think, to show that appellant, as the ostensible owner of the notes, sold them to appellee for an undisputed amount, upon condition that it would repurchase them on his request, and that appellant, after request duly made, failed to comply with such promise. Besides, appellant having received the money paid therefor, we think it is in no position to question the authority of its president to sell the notes for it or the validity of the agreement to repurchase them, especially as the transaction appears to have been in furtherance of its corporate interests. *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477. In such a case, where the sale is made to obtain money for corporate purposes, we think there is an implied and incidental power to make the sale conditional, as in the case at bar, upon an agreement for repurchase.

Many questions of law are argued by appellant that are in no way presented as such on this record, namely: the authority of the president of appellant corporation to bind the company by such a promise; whether, if he had such authority, it was not *ultra vires*; whether it was not within the statute of frauds; whether the demand for repurchase was made within a reasonable time; whether there was a sufficient tender; whether appellant was not released from all liability by failure to foreclose the mortgage, or by merger thereof as a result of appellee's purchase thereof after he became a member of the firm owning the mortgaged property; whether the court applied the proper rule of damages, and other questions including those pertaining to the rights of an indorser or guarantor.

So far as the abstract shows, the record presents nothing for us to decide except as to whether the evidence was sufficient to sustain the court's finding, for there were no objections to the rulings upon evidence, no propositions submitted to the court to be held as

Flodin v. W. H. Lutes Co., 191 Ill. App. 195.

law of the case, and no motion made during the progress of the trial, except at the close of plaintiff's case, to find the issues for the defendant, which merely raised the question whether plaintiff's evidence tended to establish his claim, namely, a conditional sale by appellant to appellee and breach of the condition. The motion being denied, defendant proceeded to put in its defense and submitted the case on questions of fact alone, in no way raising a question of law. In such a case we do not understand that the record presents any question of law for review. The same rule obtains here in our opinion that does in a case which goes directly by appeal or writ of error from the trial to the Supreme Court. In such a case (*West Chicago Park Com'rs v. Metropolitan West Side R. Co.*, 182 Ill. 246) the Court said that, in the absence of rulings on propositions of law, it would be assumed that the trial court entertained correct views of the law, and the only question left open was whether the court erred in its findings of fact. We think the same rule must prevail here where no questions of law are directly raised by submission of propositions of law, or rulings upon evidence or some motion. We so construe *Chicago Union Traction Co. v. City of Chicago*, 202 Ill. 576.

What questions of law, if any, upon such state of the record, were considered by the court below, we have no means of determining. So far as the abstract shows these questions of law are raised here for the first time, and we are, therefore, not required to consider them. Finding no occasion to disturb the court's findings of fact, the judgment will be affirmed.

Affirmed.

William J. Sandberg, Administrator, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 20,346. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 26, 1915.

Statement of the Case.

Action to recover damages on account of the death of one Schirmer, resulting from a collision with one of appellant's street cars while deceased was crossing its tracks after dark. The case was submitted to the jury on plaintiff's evidence alone, defendant offering none but relying on the insufficiency of plaintiff's evidence to show either negligence on its part or the exercise of due care by deceased. To reverse a judgment in favor of plaintiff for four thousand dollars, defendant appeals.

Deceased was walking with his head down as testified to by his widow. She last saw him at the first rail of the east tracks while so walking, and said that when he left the sidewalk the car was about two hundred feet north. She did not see the collision and the testimony of the only witness who did throw little light on the main questions. A passenger on the car testified that he felt the brakes put on suddenly and a jolt immediately afterwards. Another testified that the car was going slower and slower before the collision. The several witnesses testified that they heard no bell, and that the car was going at the rate of about six or eight miles an hour. There was no obstruction to a view of the car.

Sandberg v. Chicago Railways Co., 191 Ill. App. 199.

WEYMOUTH KIRKLAND and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

GUSTAV E. BEERLY, for appellee; EDWARD MAHER, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 149*—*when requested instruction improperly refused.* In an action against a street railway company to recover for the death of plaintiff's intestate caused by being struck by a car when he was crossing the street car tracks, a requested instruction on behalf of defendant to the effect that the mere happening of the accident together with the proof of the exercise of ordinary care on the part of the deceased does not raise a presumption of negligence on the part of defendant, *held* improperly refused, where the defendant offered no evidence in the case and there was danger that the jury might supplement the meagerness of the evidence with such presumption.

2. STREET RAILROADS, § 152*—*when argument of plaintiff's counsel prejudicial error.* In an action against a street railway company to recover damages for the death of plaintiff's intestate, where the defendant relied wholly on the insufficiency of plaintiff's case and introduced no evidence, action of court in permitting plaintiff's counsel in his argument, over objection, to allude to the fact that the defendant, though pleading not guilty, had not produced as witnesses persons whom its counsel in his opening statement said were on the car and knew how the accident happened, and thereafter permitting him to continue to dwell on the fact, comparing the attitude of the two sides in respect to producing witnesses to the occurrence, and also to say that defendant was afraid to put its motorman on the witness stand for cross-examination, *held* prejudicial error as encouraging plaintiff's counsel to argue, in effect, that defendant was guilty because it did not call witnesses in its power to produce.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hydraulic-Press Brick Company, Appellant, v. Samuel Miller et al., Appellees.

Gen. No. 20,357. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 26, 1915.

Statement of the Case.

Bill by Hydraulic-Press Brick Company praying for a mechanic's lien on the premises of Samuel Miller. To reverse a decree dismissing the bill for want of equity, complainant appeals.

It appeared that Miller, the owner of the premises, entered into a contract with one Warshavsky by which the latter agreed to construct and deliver buildings on said premises free and clear of all liens, waiving all right thereto under and by virtue of the Mechanics' Liens Act and that Warshavsky applied to complainant for brick to be used in the building. Thereupon complainant wrote Miller as follows:

"Dear Sir:

Mr. Louis Warshousky has placed an order with us for: (here follows the amount and price of the brick required)—to be delivered to your property 3742-6 Fullerton Avenue. We do not know very much about Mr. Warshousky's financial responsibility and do not wish to do him any injustice, but before accepting this order, we wish to inquire whether you will agree to see that our account is paid before final settlement is made with Mr. Warshousky.

Please kindly let us hear from you by return mail, so as not to delay the delivery of the brick.

Very truly yours,

HYDRAULIC-PRESS BRICK COMPANY."

The next day, Miller replied:

Hydraulic-Press Brick Co. v. Miller, 191 Ill App. 201.

“Gentlemen:

Kindly send the bricks for my building at 3740-6 Fullerton Av. as per receipt of your letter of the 9th inst., and oblige,

Yours truly,

SAMUEL MILLER.”

BENJAMIN F. J. ODELL, for appellant.

SOBOROFF & NEWMAN, for appellee Samuel Miller;
SAMUEL W. NEWMAN, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. MECHANICS' LIENS, § 62*—*when provision of original contract deprives subcontractor of right to lien.* A provision in a building contract between the owner and the general contractor, whereby the latter agrees to deliver the building free of liens and waives all right thereto by virtue of the Mechanic's Lien Law, prevents a subcontractor from asserting a lien.

2. GUARANTY, § 1*—*when contract constitutes.* Where a letter written by the owner to a subcontractor constituted an agreement to see that materials furnished to the general contractor would be paid out of any moneys that might be due to the latter on final settlement, *held* that the undertaking was, at most, that of a guarantor to the extent of moneys that might be so due and not a contract to pay for the materials in any event.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Appellee, v. Bowman Dairy Company, Appellant.

Gen. No. 20,803. (Not to be reported in full.)

Appeal from the County Court of Cook county; Hon. JOHN EL OWENS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Appeal dismissed. Opinion filed January 26, 1915.

Statement of the Case.

Prosecution by the People of the State of Illinois against Bowman Dairy Company, a corporation. To reverse a judgment of guilty, defendant appeals.

MONTGOMERY, HART, SMITH & STEERE, for appellant.

MACLAY HOYNE, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

CRIMINAL LAW, § 487*—*when appeal will be dismissed.* On appeal from a judgment in a criminal case, the appeal may be dismissed on appellee's motion, where the case is one in which no appeal lies and there having been no joinder in error or the equivalent thereof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thompson v. Frelinghuysen, 191 Ill. App. 204.

Frank R. Thompson, Appellant, v. J. S. Frelinghuysen, Appellee.**Gen. No. 20,274.**

1. **PRINCIPAL AND AGENT, § 69***—*when agent entitled to commissions.* In an action for contingent commissions under a written contract by which a plaintiff was to act as insurance agent for several companies, *held* that the plaintiff's right to such commissions became vested at the end of the year, although the total amount could not be ascertained until the expiration of another year, and such right was not affected by a contract relating to future relations between the parties.

2. **PRINCIPAL AND AGENT, § 83***—*what amount of agent's commissions.* In an action for insurance commissions, a contention that office expenses of the plaintiff were not considered in determining the amount of the plaintiff's claim was not maintainable, it appearing that all expenses were satisfied, being charged against premiums, and the contention was contrary to the previous practice of the parties.

3. **APPEAL AND ERROR, § 1810***—*when Appellate Court may include interest in judgment.* In an action on an instrument in writing tried before the court without a jury, the court may include interest on the judgment rendered on appeal.

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and judgment here with finding of facts. Opinion filed January 26, 1915. *Certiorari* denied by Supreme Court (making opinion final).

BATES, HARDING, EDGEWORTH & BATES, for appellant.

W. S. JOHNSON and GEORGE GILLETTE, for appellee.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Frank R. Thompson commenced an action in assumpsit in the Superior Court of Cook county upon a written contract to recover of the defendant, J. S. Frelinghuysen, an unpaid balance for certain "con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tingent commissions" earned by him under said contract. On the trial the plaintiff claimed that he was entitled to the total sum of \$3,080.85, together with interest thereon, at five per cent. per annum, from January 1, 1907. It does not appear that the *amount* of plaintiff's claim was disputed. The defense was that under the evidence the plaintiff was not legally entitled to recover any sum whatsoever from the defendant. The cause was heard before the court without a jury, resulting in a finding and judgment in favor of the defendant. It is here contended by the plaintiff that the judgment of the trial court should be reversed and that a judgment should be entered in this court against the defendant for said amount and interest.

The facts as disclosed from the evidence are substantially as follows: The defendant, Frelinghuysen, had been for many years the general agent in the city of New York for a number of fire insurance companies. His business required that he have a representative at Chicago, and plaintiff acted in that capacity during the year 1905 under the terms of the written contract sued upon. For several years prior to 1905 plaintiff had acted as defendant's representative at Chicago, and during the year 1904 he was so acting under a contract substantially the same as the contract sued upon, there being a slight difference in the percentage to be paid plaintiff as contingent commissions. The contract sued upon is in the form of a letter, dated August 3, 1905, signed by defendant in New York and addressed to plaintiff at Chicago. It is therein stated that plaintiff is appointed the representative of defendant at Chicago, "as of January 1, 1905," for certain named states, including the state of Illinois, and that the contract is "to continue in full force and effect until terminated by either party by written notice of sixty days." It is further stated that nothing in the agreement is to be construed as

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entitling plaintiff to the sole representation of defendant's companies in the district named, or to entitle plaintiff "to contingent commission on business not written, secured or approved" by plaintiff in said district, or to prevent defendant from establishing such other agencies or representatives as may seem expedient to him. The paragraph of the contract headed "Remuneration" is as follows:

"Your salary will be \$175.00 per month, paid monthly, and \$100.00 per annum for each \$10,000.00 of premiums over \$80,000.00 in the Manufacturers Lloyds, Merchants Fire Lloyds, Wilmington National, Stuyvesant, Pacific, Insurance Underwriters and Spring Garden, and the actual disbursements made by you for office rent and office expenses.

"In addition to this we will pay you a contingent commission of 9½% on the net profits up to July 1, 1905, and 9% on the balance of the year on the combined business of the National, Stuyvesant, Pacific, Insurance Underwriters and Spring Garden, and a contingent commission of 5% on the net profits of the Manufacturers Lloyds, Merchants Fire Lloyds and Wilmington. These profits to be calculated annually by deducting all losses, commissions, and all other expenses from the EARNED PREMIUM on risks written and/or approved by you in said companies. The commissions on business placed direct with Jameson & Frelinghuysen, Chicago, and the commissions received from outside companies on business placed by Jameson & Frelinghuysen, Chicago, to be placed as an offset against the expenses of the Chicago office in calculating the contingent commission.

"We will also pay you one-third of the excess brokerage commission on all business placed by you in the companies in our office as well as all other companies, being the excess of the total commissions received on such brokerage business over the expenses of Jameson & Frelinghuysen's Chicago office, said expenses not to include the commissions paid to other brokers for business of the various companies. The excess brokerage to be figured at the end of each year."

Prior to August 3, 1905, and from January 1, 1905, plaintiff had been working under a verbal arrangement with defendant, substantially the same as stated in said contract. It is to be noticed that the net profits, upon which plaintiff's contingent commissions depend, are to be "calculated *annually*." This provision, together with the further provision that the contract is to continue in full force until terminated by either party by a sixty days' written notice, suggests that it was contemplated at the time of the making of the contract that the relation of principal and agent between the parties should continue through a term of years. Plaintiff continued to work under said contract up to and including December 31, 1905. Early in December, 1905, however, by mutual agreement, a new contract was entered into between the parties, to commence January 1, 1906, and to continue in force until terminated by either party. This contract is evidenced by a letter written by defendant to plaintiff, dated December 4, 1905, and hereinafter referred to, and under this contract plaintiff worked throughout the year 1906.

It is also to be noticed that in the contract of August 3, 1905, no *special* provision is made for a settlement of plaintiff's contingent commissions, in the event of the termination of said contract by notice or by mutual agreement. It is further to be noticed that the net profits, upon which plaintiff's contingent commissions depend, are to be calculated "by deducting all losses, commissions, and all other expenses from the *earned premium* on risks written and/or approved" by plaintiff in the companies named. The words "earned premium" were emphasized by being written in the contract in capital letters, and, as stated by counsel for defendant in their printed argument here filed, the present suit turns upon the construction of the clause of the contract in which those words appear.

There is no controversy in this case as to the mean-

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ing of the words "earned premium" as used in said contract. Counsel agree that the earned premium on a policy of fire insurance is "that portion of the whole premium which the time the policy has run bears to the whole term; that is, if a policy issued for a year, upon which the whole premium is \$100, has run for three months, the earned premium would be \$25; if it has run for six months, the earned premium would be \$50." Counsel also agrees that the policies written or approved during the year 1905 by plaintiff in the various companies named in the contract were all one-year policies, *i. e.*, policies which expired, if not sooner terminated by a fire loss or by cancellation, one year from the date on which they were issued. By the terms of the contract the net profits were to be calculated, not only by deducting "commissions and all other expenses" from the earned premium on said risks, but also by deducting "all losses" on said risks. It is apparent that, on a one-year policy written or approved by plaintiff on December 31, 1905, a fire loss might occur on the last day of the life of the policy, *viz.*, December 31, 1906. It is also apparent that it would be impossible to ascertain whether there would be any profit on the writing of a particular policy until the policy had expired; and it would also be impossible to ascertain whether there would be any profit, or if some profit how much, upon the aggregate premiums received from all the policies written or approved by plaintiff during the year 1905, until the expiration of all such policies, which, as to policies bearing date December 31, 1905, would not occur until December 31, 1906. Of course, it is not difficult to compute the amount of the premium "earned" at any particular time on a policy of fire insurance, but to compute the premium earned at the end of a year on each of many policies written from time to time during the year, in order to ascertain the aggregate "earned premiums" on the year's business, involves considerable labor and

is seldom done. Where, as in this case, the policies are all one-year policies a much simpler method is usually adopted, viz., one-half of the aggregate premiums of policies written during the year is treated as earned premiums and the other half as unearned premiums. This latter half is sometimes called "re-insurance reserve," and is that portion of the aggregate premiums received during the year which is kept as a fund for the protection of outstanding policies. That the parties agreed to this method of computing the earned premiums and the "re-insurance reserve" on the policies written or approved by plaintiff under the contract sued upon, as well as under the prior contract for the year 1904, is apparent from the facts and circumstances in evidence, and particularly from certain letters. About a month after the making of the written contract of August 3, 1905, plaintiff wrote defendant requesting the latter's interpretation of the last two lines of the first clause of the paragraph entitled "Remuneration," which reads, "and the actual disbursements made by you for office rent and expenses," and stating, "I take it for granted that you intend this to read in connection with the balance of this paragraph. The only change to be made was in the contingent." To this letter defendant, on September 8, 1905, wrote plaintiff in reply, as follows:

"Our understanding of your contract is as follows:

"From the premiums is deducted the commission paid brokers and all the expenses of your office of every kind and description, including your own salary and traveling expenses; in fact every expense of whatever nature that pertains to the Chicago business incurred at your office.

"Also deduct all losses incurred during the year and any increase in settlement of losses incurred in *previous* years.

"Also 50% *reinsurance reserve*.

"There is *added* to your business the earned pre-

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miums of the *previous* year, *being the amount of reinsurance reserve deducted.*

"Also the amount of commissions on direct business, and all commissions on business placed outside up to but not exceeding the amount of the Chicago expenses."

In accordance with this construction of the contract plaintiff, during the spring of 1906, prepared a statement of the business done by him, showing the net profits thereon as of January 1, 1906, and his earnings on contingent commissions. This statement was forwarded to defendant by letter, dated May 3, 1906, in which plaintiff referred to said statement as his "contingent statement for the year 1905," and requested a "check to cover." After some correspondence plaintiff, on June 18, 1906, forwarded a corrected statement showing the amount due him, as of January 1, 1906, to be \$4,704.90. This latter statement was introduced in evidence. The periods from January 1 to June 30 and from July 1 to December 31, 1905, were separated in the statement because of the slight difference in the per cent. of contingent commission stipulated in the contract for the first and the second six months' business. It appears from the statement that the aggregate premiums written and collected by plaintiff during the first six months' period were \$50,441.44, and during the second six months' period \$50,175.84, or a total for the year of \$100,617.28. It further appears that, in arriving at the net profits, plaintiff in said statement *deducted* from the aggregate premium receipts for each six months' period, in addition to commissions paid agents all losses and all expenses, one-half of said premium receipts for each period, designating the same as "50 per cent. re-insurance reserve," or a total "re-insurance reserve" on the business for the year 1905 of \$50,308.64. After making these deductions plaintiff computed his contingent commissions for each six months' period, at the percentages stipulated in the contract, from the remain-

der. In other words plaintiff, as to the contingent commissions becoming due him, then requested a payment *on account*, and that he then be paid on the basis of one-half for the net premium receipts procured through his efforts during the year 1905, both parties then knowing that other losses might or would occur on the unexpired policies, which would reduce the amount of the net profits on the policies written by plaintiff during said year. It further appears from said statement, and from other evidence, that plaintiff claimed that there was then due him, on account of his contingent commission on policies *written in 1905*, the sum of \$1,686.99. At this time it also appears that there was due him a certain balance for other contingent commissions on policies written by him for defendant, under and by virtue of his 1904 contract, *during the year 1904*, which policies had all expired on December 31, 1905. This was so because a "re-insurance reserve" had similarly been deducted from the amount of the net premiums received on policies written by plaintiff for defendant during said year 1904. Accordingly, as appears from said statement contained in plaintiff's said letter of June 18, 1906, plaintiff then claimed the additional sum (as subsequently corrected) of \$3,017.91, for contingent commissions on "re-insurance reserve brought forward from 1904." These two amounts, viz., \$1,686.99 and \$3,017.91, added together make the total sum of \$4,704.90, as then claimed by plaintiff. On June 26, 1906, the defendant forwarded to plaintiff at Chicago seven checks, each payable to plaintiff's order, aggregating the said sum of \$4,704.90. These checks were received by plaintiff and deposited and subsequently paid, and plaintiff on June 29, 1906, wrote defendant acknowledging the receipt of "checks for my 1905 contingent."

As previously stated, a new written contract was entered into between the parties by mutual agreement in December, 1905. This contract is also in the form

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of a letter written by defendant to plaintiff, dated December 4, 1905, one clause of which provides that the contract is to continue in force until terminated by either party, and another clause refers to the payment by defendant to plaintiff of one-half of certain "excess brokerage commission," which is to be figured "at the end of each year." The other clauses are as follows:

"In consideration of the fact that you are to make your headquarters in the office of Messrs. Rollins & Burdick at Chicago for the purpose of *overseeing and regulating* the business of our companies *outside of Cook County*, we propose to make the following arrangements with you: We will pay you a salary of one hundred and seventy-five (\$175.00) dollars per month, paid monthly, and one hundred (\$100.00) dollars per annum for each \$10,000 in premiums over \$60,000.00 in the Manufacturers Lloyds, the Merchants Fire Lloyds, Wilmington, Stuyvesant, Pacific and Insurance Underwriters, and we will also pay such traveling expenses as you may incur in taking care of our outside business.

"In addition to this we will pay you a contingent commission of 10% on the combined net profits of the Stuyvesant, Pacific, Insurance Underwriters and Wilmington, and a contingent commission of 5% on the combined net profits of the Manufacturers Lloyds and the Merchants Fire Lloyds. These profits are to be calculated *annually* by deducting all losses, commissions and other expenses from the EARNED PREMIUM on risks written and/or approved by Messrs. Rollins & Burdick in said companies, the commissions on business placed direct with you and the commissions received from outside companies on business placed by you, to be placed as an off-set against the expenses of the Chicago office in calculating the contingent commission."

It will be noticed that in this contract there is no provision that plaintiff relinquishes any claim he may have to the unpaid balance of his contingent commissions on the net profits on the policies written by him during the year 1905. And the evidence does not dis-

close that he at any time, either verbally or in writing, relinquished such claim, which, as we have seen, arises because of the deduction required to be made on account of said "re-insurance reserve."

On February 26, 1907, plaintiff wrote defendant a letter in which he inclosed a "final contingent statement on business written during the year 1905"; and also a "contingent statement on business written during the year 1906," and requested a check. On March 7, 1907, defendant wrote plaintiff in part as follows: "We have nearly finished checking up this account. * * * We understand from our Mr. Meserole that in consideration of the new arrangement made on the termination of your contract on December 31-05, there was to be no contingent paid on the unearned premium on business written in 1905. * * * Documents in our possession show distinctly that our understanding of the matter given above is the case." On March 9th plaintiff replied: "The subject of my relinquishing my rights under the old agreement pertaining to the 1905 business was not even mentioned in any conversation which I had with your Mr. Meserole or any one else. Whatever documents you may have in your possession are entirely foreign to me." Several other letters passed between the parties, the plaintiff insisting that he was entitled to said commissions, and the defendant taking the position, as stated in one of the letters, that "there is no contingent commission due you on unearned premiums for 1905, the agreement of 1905 having been cancelled and abrogated upon the new agreement for 1906." On June 22, 1907, plaintiff forwarded to defendant a corrected statement "for the balance of contingent commission due under the 1905 agreement," showing the sum of \$3,231.73 to be due him. The defendant refused to pay the same or any part thereof, and on June 28, 1907, plaintiff commenced the present suit. On the trial plaintiff introduced a further corrected state-

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ment, showing the sum of \$3,080.25 to be due him. The correctness of this *amount* does not appear to have been disputed by the defendant on the trial, nor is it here disputed.

At the conclusion of all the evidence plaintiff submitted to the court the following proposition, to be held as the law applicable to the case, but the court marked the same "Refused," and plaintiff excepted:

"The court finds as a matter of law that, under the contracts introduced in evidence in this case, the plaintiff is entitled to receive and recover from defendant that portion of the profits of the business written or placed by him in the year 1905 as is designated in the contract dated August 3rd, 1905, and covering from January 1st, 1905, as soon as said profits could be ascertained, and that said profits could not be ascertained until January 1st, 1907."

Counsel for defendant here contend, in substance, that *all* contingent commissions due plaintiff under the 1905 contract sued upon were *paid* to him on June 26, 1906, by said checks aggregating the sum of \$4,704.90; that it was not contemplated by the parties that plaintiff was to be paid contingent commissions on the "unearned" premiums as of January 1, 1906, which unearned premiums, or a portion of them, might become "earned" premiums on January 1, 1907; and that the "unearned" premiums as of January 1, 1906, which were carried forward as "re-insurance reserve" and upon which plaintiff now claims commissions, were not *earned* in the year 1905 (*i. e.*, during the life of the contract sued upon) but became earned during the year 1906, after the 1905 contract had ceased to exist, it having been terminated by the making of the new 1906 contract. Counsel however admit, in their printed argument, that *if* the 1905 contract sued upon had not been terminated at the end of that year, and plaintiff had continued to work under said contract during the year 1906, plaintiff at the end of the year 1906 would have been entitled to contingent commis-

sions on the "unearned" premiums as of January 1, 1906, and this because said premiums would have become earned in 1906 and during the life of the contract.

Counsel for plaintiff contend, in substance, that the commissions for which plaintiff sues were earned during the year 1905 when, through his efforts, the policies were written and the premiums paid; that his right thereto became *vested* on January 1, 1906; that the *value* of that right, *i. e.*, the *amount* to be paid him, alone remained uncertain or contingent, which could not be determined until January 1, 1907, when all the policies written in 1905 had expired and all losses could then be figured and the net profits on the 1905 business determined, and that payment of the correct amount of commissions was merely postponed until it could be ascertained; that this vested right was not affected or relinquished by anything contained in the new contract of December 4, 1905, which related solely to the future relations between the parties from and after January 1, 1906, and that it is not shown by the evidence that said right was relinquished by any other act or agreement of the plaintiff and that by defendant's construction of the contract sued upon, as contained in his letter of September 8, 1905, and by his paying plaintiff, on June 26, 1906, the sum of \$3,017.91, as commission on business done by plaintiff in the year 1904, which sum was based on the "re-insurance reserve" previously deducted from the premium receipts during said year 1904, defendant recognized the right of plaintiff to the balance of commissions here in question.

After careful consideration of the evidence and of the arguments of respective counsel in support of their contentions, we have reached the conclusion that the trial court erred in entering the judgment appealed from and in not entering a judgment in favor of plaintiff for the sum of \$3,080.85, together with interest

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thereon. We are of the opinion that, under all the facts and circumstances in evidence, plaintiff's right to the commissions here in question became vested in him at the end of year 1905, although the total amount of commissions to be ultimately paid him on account of premiums written and collected by him during said year could not definitely be determined until the expiration of the year 1906, and that his right to said commissions was not affected or relinquished by said new contract of December 4, 1905, or by his acts thereunder or by any other acts of his.

In the case of *Alabama Oil & Pipe Line Co. v. Sun Co.*, 99 Tex. 606, a contract under which certain rights had accrued was canceled by a new agreement, and the question before the court was whether the new agreement so far abrogated the old as to defeat a recovery on certain rights vested thereunder. The Court said (p. 611):

"It is true that parties to a contract may agree to cancel it and, if there be nothing to indicate a different intention, each party will be fully discharged from all liability under such contract. But the use of the word 'rescind' or 'cancel,' will not necessarily have that effect. The liability in this case must be referred to the terms of the agreement to cancel and, in order to interpret that agreement, we must look to the intention of the parties, the character of the contract to be cancelled and to the situation of the parties at the time as well as to the attending facts and circumstances which throw light upon the question of intent. If it appears from these facts and circumstances that it was not the intention of the parties that the act of cancellation should have a retroactive effect to destroy previously vested rights, then the contract will be so construed as to preserve those rights." See also *City of New York v. New York Refrigerating Const. Co.*, 146 N. Y. 210, 215; *Hayes v. City of Nashville*, 26 C. C. A. 59, 80 Fed. 641, 646; *Dibble v. Dimick*, 143 N. Y. 549, 553; *Greene & Sons v. Freund*, 80 C. C. A. 387, 150 Fed. 721; *Singer Mfg. Co. v. Brewer*, 78 Ark.

202, 204; *Sackett v. Centaur Motor Co.*, 189 Ill. App. 372.

It is also contended by counsel for defendant that plaintiff is not entitled to a judgment in any amount because no office expenses, incurred by plaintiff in the year 1906 in giving the necessary attention to the risks on policies written in 1905, are considered by plaintiff in figuring the amount of his present claim, which is based on the "re-insurance reserve" of 1905. We do not think there is any merit in the contention. All the expenses of getting the business or premiums, contained in said "re-insurance reserve," had been charged against the entire premiums received during 1905 in plaintiff's account rendered on June 18, 1906, and by the settlement of that account on June 26, 1906, said expenses were satisfied. Furthermore, the contention of counsel is contrary to the previous practice of the parties, as is shown in the item of the account of June 18, 1906, relative to the 1904 "reinsurance reserve." Furthermore, by both the 1905 and the 1906 contracts it was provided that office expenses should be paid out of "excess brokerage commissions," etc., which the evidence shows more than covered all office expenses. Furthermore, by the 1906 contract it was provided that plaintiff should "oversee and regulate" the business of defendant's companies "outside of Cook County," and the evidence shows that after January 1, 1906, he did so, as he formerly had done, and that, as to the unexpired 1905 policies, he did whatever had to be done in precisely the same manner as he would have done had the 1905 contract been continued in force.

Counsel for defendant place great reliance on the case of *Mississippi Home Ins. Co. v. Adams & Boyle*, 84 Ark. 431, as sustaining their construction of the contract in question. The facts of the present case appear to be materially different from those in that case. Furthermore, in the contract here in question no special provision is made as to the settlement of

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plaintiff's contingent commissions in the event of the termination of the contract, while in said *Adams* case there was the following provision: "This agreement may be terminated at any time by either party after giving thirty (30) days' written notice to the other, in which event payment of compensation as above provided shall be made, and *will be in liquidation of all payments* to the party of the second part by the party of the first part." And we do not think that any of the other cases cited by counsel sustain their position taken in this case. In those cases the facts are so at variance with those of the present case as not to be applicable.

By virtue of the instrument of writing or contract sued upon and under the facts in evidence, we think that the judgment to be here entered in favor of the plaintiff and against the defendant should not only be for said amount of \$3,080.85, but should also include interest thereon, at the legal rate of five per cent. per annum, from June 22, 1907, to the present date. Section 2, ch. 74, Hurd's R. S. (J. & A. ¶ 6691); *A. B. Dick Co. v. Sherwood Letter File Co.*, 157 Ill. 325, 338; *Bauer v. Hindley*, 222 Ill. 319, 323. In a case tried before the court without a jury we can include interest in the judgment here entered. *Dean & Son, Ltd. v. W. B. Conkey Co.*, 180 Ill. App. 162, 183, and cases there cited. The interest on \$3,080.85 at said rate from June 22, 1907, to January 22, 1915, is \$1,168.15, which added to \$3,080.85, makes the total sum of \$4,249.

The judgment of the Superior Court of Cook county is reversed and judgment is entered in this court in favor of the plaintiff, Frank R. Thompson, and against the defendant, J. S. Frelinghuysen, in the sum of \$4,249.

Judgment reversed and judgment here.

Finding of facts.—We find as facts that the plaintiff, Frank R. Thompson, made the contract or agree-

ment sued upon, dated August 3, 1905, with the defendant, J. S. Frelinghuysen; that he performed all services required to be performed by him thereunder as agent or representative of the defendant; that he acted as such representative thereunder until and including December 31, 1905; that he acted as the agent or representative of the defendant during the year 1906, but under another contract, dated December 4, 1905; that on January 1, 1907, there became and was due plaintiff from defendant a balance of \$3,080.85 for certain commissions for services performed by plaintiff for defendant during the year 1905 and up to and including December 31, 1905, under the contract or agreement sued upon; that plaintiff at no time waived or relinquished the payment to him of said balance for commissions; and that no part of said sum has ever been paid plaintiff.

**Mercantile Trust Company of Illinois, Appellee, v.
E. H. Kastor, Appellant.**

Gen. No. 20,295.

1. PLEDGES, § 2*—*what constitutes pledge.* Where an agreement stated that a corporation was desirous of "selling" accounts receivable, and that plaintiff agreed "to buy" such accounts as were "acceptable," but such agreement provided that the corporation should pay all "losses" incurred in and about any account in default suggesting that the plaintiff would look to the corporation and not the debtor if the latter should be insolvent or would not pay, and also provided that the corporation should make entries on its books of the sale, and stating that the corporation was financially responsible, it was an agreement for the loaning of money to the corporation upon accounts receivable as security, and not a sale of such accounts.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. PLEDGES, § 2*—*when pledge distinct from sale.* Provisions of an agreement as to accounts receivable allowing the "buyer" to retain accounts as "security," held inconsistent with the idea of a sale of such accounts.

3. PLEDGES, § 2*—*what distinguishes sale from pledge.* Where a corporation "selling" accounts agreed to guaranty all losses, the idea of guaranty was inconsistent with the idea of a sale of the accounts, since it suggested that the plaintiff have additional security for the money advanced for the accounts.

4. CORPORATION, § 448*—*when loan contract ultra vires.* A corporation organized under the General Incorporation Act of Illinois is prohibited from engaging in the business of loaning money (Hurd's R. S., ch. 32, sec. 1, J. & A. ¶ 2418), and such loan is absolutely void.

5. CORPORATIONS, § 443*—*what effect of void agreement.* An action cannot be maintained against a corporation as guarantor of a void agreement.

6. APPEAL AND ERROR, § 1802*—*when reversal without remanding proper.* The Appellate Court may reverse without remanding where the facts are different from the finding of the trial court and are recited in the judgment, and when it reverses for errors of law which cannot be cured on another trial.

Appeal from the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed. Opinion filed January 26, 1915. Rehearing denied February 6, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. On October 8, 1913, the plaintiff, Mercantile Trust Company of Illinois, a corporation, commenced an action of the first class, in contract, against E. H. Kastor, defendant, on his written guaranty in connection with a certain written agreement between the United States Kellastone Company, an Oklahoma corporation with principal place of business at Chicago, hereinafter referred to as the Kellastone Company, and the plaintiff. The plaintiff is an Illinois corporation, organized under the general incorporation act of this State. While by its charter it was authorized, among other things, "to buy, sell, hold and own open accounts * * * and choses in action of any and every kind," it was not authorized to engage

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in the business of loaning money. On November 18, 1913, the cause was tried before a jury who returned a verdict finding the issues against the defendant and assessing plaintiff's damages at the sum of \$3,140.12. The court instructed the jury that said contract between the Kellastone Company and the plaintiff, introduced in evidence, "is construed by the court as a contract of sale and not a pledge or a loan," to the giving of which instruction the defendant excepted. Judgment for \$3,140.12 was entered upon the verdict and defendant excepted, and defendant seeks by this appeal to reverse the judgment.

It was alleged in plaintiff's statement of claim, in substance, that \$4,410.32 was due plaintiff from defendant "as guarantor of the contract" between the Kellastone Company and plaintiff, under and by virtue of which contract the Kellastone Company "assigned and sold" to plaintiff certain of its accounts against three different parties, "which accounts remain unpaid by the debtors," and which accounts the Kellastone Company "has failed to repay, pursuant to the terms of the agreement aforementioned, after due demand; wherefore, defendant, as guarantor, is liable to pay the *amount of said accounts* to plaintiff." The accounts were set forth in said statement of claim as follows:

"H. A. Jones, Los Angeles, California.

7/26/1913: 60 To Mdse. D. & R. G.	62651	\$1240.50
8/28 " 30 " " N. Y. C.	96551	885.00
		<hr/>
		\$2125.50

J. O. Davis, Hinsdale, Illinois:

8/27/1913: 30 To Mdse.		708.07
------------------------	--	--------

Wolverine Building and Supply Co.,

Detroit, Michigan.

8/21/1913: 30 dys To Mdse. Car—	95868	\$10.00
9/2 " " " "	10447	640.00
4 " " " "		637.50
		<hr/>
		\$2087.50

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	Cr.	
Cash	\$40.00	
"	280.00	
"	50.75	
"	140.00	510.75
		<hr/>
		1576.75
		<hr/>
		\$4410.32"

The contract between the Kellastone Company and plaintiff, together with the guaranty signed by defendant and by two other persons (said contract and guaranty being partly printed and partly in writing, and the guaranty being on the reverse side of the paper), were attached to plaintiff's statement of claim as an exhibit and made a part thereof and are as follows (*italics ours*):

"ARTICLES OF AGREEMENT, entered into at Chicago, Illinois, this second day of September, A. D. 1913, between UNITED STATES KELLASTONE COMPANY, an Oklahoma Corporation, hereinafter designated as first party, and MERCANTILE TRUST COMPANY OF ILLINOIS, an Illinois Corporation, hereinafter designated as second party.

WITNESSETH, That Whereas, first party is desirous of selling to second party, Contracts, Accounts Receivable and Choses in Action, hereinafter designated as Accounts, evidencing shipments of personal property;

Now, THEREFORE, In consideration of the premises the parties agree as follows:

FIRST: Second party agrees to buy the Accounts belonging to first party which *are acceptable to it*, and to pay therefor 99% of the face value thereof on Accounts that are paid within 15 days from date of purchase by second party, and 98% of the face value thereof on Accounts that are paid within 30 days from date of purchase by second party, and for each 30 days thereafter that said Accounts are not paid, the purchase price shall be reduced 1%. Payment to be made

by second party as follows: 77% of the face value thereof upon acceptance by second party; the remainder, less all deductions, to be paid to first party immediately upon payment of any such Accounts to second party; provided, however, that if at the time of any settlement between the parties hereto, *any* of the Accounts purchased hereunder shall be *in Default*, payment of such remainder, while any of the Accounts are in Default, shall be *discretionary* with second party.

SECOND: The term *Default or loss* as used in this contract is construed to mean the non-payment of an Account to second party at maturity; insolvency of the debtor; failure or refusal of a debtor to accept, receive and retain the property evidenced by such an Account. First party agrees to pay to second party *all expenses, attorney's fees and losses* incurred by second party in and about any Account in Default.

THIRD: It is agreed that contemporaneously with the purchase of Accounts, first party shall assign and set over to second party, such Accounts purchased by it, to the end that second party shall be and become subrogated to all of the rights possessed by first party in respect thereto. Second party shall have the right to endorse the name of first party on all evidences of shipments or payment pertaining to Accounts purchased hereunder. First party shall make entries upon its books disclosing the sale to second party of Accounts purchased hereunder, and all records pertaining thereto shall at all times be open to the inspection of the second party.

FOURTH: It is expressly understood that the purchase of Accounts by the second party is made upon representations in writing concerning the financial responsibility of the first party; statements of which are to be furnished second party once every calendar year.

FIFTH: First party is hereby given the right to make collections of Accounts purchased by second party and to that extent first party shall act as the Agent of second party. The agency hereby created may be terminated by either party upon written notice. During this agency, first party agrees to transmit and deliver to second party at its offices in Chicago, Illi-

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nois, on the day of receipt thereof, all evidences of payment of Accounts purchased hereunder in the original form received.

SIXTH: This agreement and all its provisions shall inure to and become binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, The parties hereto have caused these presents to be executed on the day and year first above written.

UNITED STATES KELLASTONE CO., (Seal)

By AARON BODENWEISER, (Seal),

(SEAL)

President

Attest: J. G. McCONNELL,

Asst. Secretary.

MERCANTILE TRUST COMPANY OF ILLINOIS.

(SEAL)

Attest: R. W. PEARSON

By A. D. NAST,

Secretary.

President.

The following Guaranty and Waiver is to be signed by individuals.

In consideration of the sum of One (\$1.00) Dollar and other valuable considerations paid by MERCANTILE TRUST COMPANY OF ILLINOIS, to each of the undersigned, receipt of which is hereby acknowledged, they and each of them do hereby jointly and severally guarantee to MERCANTILE TRUST COMPANY OF ILLINOIS, its successors or assigns, the full, prompt and faithful *payment, performance and discharge* by U. S. KELLASTONE COMPANY, of *each of the provisions and conditions of the agreement on reverse side hereof, or any other instrument given or executed in pursuance thereof.*

The undersigned hereby jointly and severally waive all notice of default by first party, and waive notice of acceptance of this guaranty of MERCANTILE TRUST COMPANY OF ILLINOIS, its successors or assigns.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this 2nd day of September, A. D. 1913.

AARON BODENWEISER

(Seal)

J. G. McCONNELL

(Seal)

E. H. KASTOR

(Seal)"

The defendant, Kastor, in his amended affidavit of merits, alleged, in substance: (1) That the contract sued upon (on the back of which was defendant's guaranty) is one for the loaning of money and is *ultra vires* the plaintiff corporation; (2) that said contract, being for the loaning of money, is null and void for the reason that plaintiff, as a corporation organized under the General Incorporation Act of this State is prohibited by law from engaging in the "business of loaning money," and that said guaranty is also invalid; (3) that said contract, being for the loaning of money, is usurious; (4) that plaintiff has collected moneys on certain accounts transferred to it subsequent to the execution of said contract and guaranty and applied such collections on accounts transferred to it prior to the execution of said contract and guaranty without authority from defendant; (5) that the amounts claimed to be due on the particular accounts mentioned in plaintiff's statement of claim are incorrect; and (6) that at the time of execution of said contract and guaranty it was agreed between plaintiff and defendant that defendant should not be liable except in the event of ultimate financial loss sustained by plaintiff by reason of its dealings with the Kellastone Company, and after plaintiff had made all reasonable efforts to realize upon the accounts assigned to it.

It appears from the evidence introduced at the trial that just prior to the making of the contract sued upon, dated September 2, 1913, the Kellastone Company, which company was engaged in manufacturing and selling a certain kind of building material, was "hard up" and needed money to run its business, and requested monetary assistance of the plaintiff. At this time the defendant, Kastor, had recently become a large stockholder in the Kellastone Company, though not the owner of a majority of the stock. Prior to the time of his acquiring said stock and prior to the execution of said contract, the Kellastone Company had entered into a

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similar contract with plaintiff, with which prior contract Kastor had no connection and under which a number of accounts receivable of the Kellastone Company had been assigned to plaintiff, and it was claimed by plaintiff that, because of certain "duplicated" and "crooked" invoices, it had suffered a loss in the transactions and that the Kellastone Company was indebted to it on said "old" accounts in a large sum. When the Kellastone Company suggested the making of the contract sued upon, plaintiff requested that Kastor, as well as Bodenweiser and McConnell, sign said so-called "guaranty and waiver." Before Kastor would agree to sign the same, he demanded of and received from Nast, president of plaintiff, a letter wherein Nast wrote that "*we look to you only to make good any financial loss we may suffer on account of our dealings with*" said Kellastone Company. Shortly after the execution of the contract sued upon, the Kellastone Company delivered over to the plaintiff various of its accounts receivable, including the accounts mentioned in plaintiff's statement of claim, aggregating, face value, more than \$36,000, and on account of which plaintiff paid to the Kellastone Company, in cash, seventy-seven per cent. of the face value of said accounts, and no more. Each time any accounts were turned over to plaintiff, a certain so-called "certificate of indebtedness," describing the accounts, was signed by the Kellastone Company and delivered with the accounts to plaintiff. One of these certificates, introduced in evidence, is dated September 2, 1913, and describes fourteen accounts of the aggregate face value of \$11,318. It is therein "certified" that the persons named therein are indebted to the "undersigned" (Kellastone Company) for merchandise sold and delivered in the sums set opposite their respective names. Then follows a tabulation, showing respectively the dates of the bills, the names of the debtors, their addresses, the amounts, and the terms of payment,

whether thirty or sixty days. Immediately under the tabulation of the accounts, and forming a part of said certificate, is the following:

“For and in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations to the undersigned in hand paid, the receipt whereof is hereby acknowledged, the undersigned hereby sells, assigns and transfers to Mercantile Trust Company of Illinois, a corporation, its successors or assigns, all its right, title and interest in and to the contracts and open accounts above named, together with the merchandise represented thereby and including the right of stoppage in transitu. The invoices which amount to Eleven Thousand Three Hundred Eighteen and no/100 Dollars (\$11318.00) are herewith delivered to Mercantile Trust Company of Illinois. The undersigned *guarantees* that the moneys due on said contracts and open accounts are correctly set forth in above schedule; that full deliveries have been made on all said contracts and open accounts in accordance with the specifications of the buyer; that there is no contra account against any of them; that the amounts due on said contracts and open accounts as set out in said schedules are not disputed by the debtor and are not past due; that there are no offsets against said accounts or any of them for freight, drayage or other carrying charges, commissions, damages or any other counterclaims of any nature whatsoever; that the amount set out in each item of said schedule is net and that the payment of said item or items is not contingent on the fulfillment of any contracts, past or future, and that entries have been made on its books disclosing the absolute sale thereof to Mercantile Trust Company of Illinois, its successors or assigns. The undersigned further agrees to advise Mercantile Trust Company of Illinois, its successors or assigns, of any occurrence that may in any respect impair or reduce the amount shown to be due from debtors on any of the above named contracts or open accounts. It further agrees to submit to Mercantile Trust Company of Illinois, its successors or assigns, the original correspondence or other documentary evidence relating to

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any of the contracts or open accounts listed above whenever requested to do so by Mercantile Trust Company of Illinois, its successors or assigns.

In consideration of the promises aforesaid, and the further sum of One Dollar to the undersigned heretofore paid, the undersigned hereby *guarantees the payment in full* to Mercantile Trust Company of Illinois, its successors or assigns, of the above named contracts and open accounts in accordance with the terms indicated and appearing thereon.

Sep 3, 1913 339.54 — 3% Reg.

8714.86

2263.60

\$11318.00

U. S. KELLASTONE COMPANY (Seal)

AARON BODENWEISER."

Both of the items of the "Jones" account, mentioned in plaintiff's statement of claim, and the first item of the "Wolverine" account, were included in said instrument and said accounts were assigned to plaintiff. Other similar instruments were subsequently signed by the Kellastone Company. The "Davis" account, mentioned in said statement of claim, and the second item of said "Wolverine" account were assigned to plaintiff by instrument dated September 4, 1913, and the third item of said "Wolverine" account by instrument dated September 12, 1913. The Kellastone Company received from the plaintiff, in cash, seventy-seven per cent., only, of the face value of said Jones, Davis and Wolverine accounts, or the sum of \$3,789.22. Subsequently \$510.75 was credited by the plaintiff as having been received in cash by plaintiff on said Wolverine account, leaving a balance of money actually paid by plaintiff to the Kellastone Company, and not returned to plaintiff on said accounts, of \$3,278.47. Plaintiff, however, about one month after said accounts were assigned to it, sued to recover from defendant as guarantor the face value of said accounts, less said sum of \$510.75, or the net sum

of \$4,410.32. It does not appear whether said debtors were insolvent or not, and it does not appear that any suit was brought against any of them to enforce the collection of said accounts. As to the Jones account, Mr. Nast, president of plaintiff, testified, in substance, that plaintiff had been trying to collect it but without success, that Jones claimed a set-off and had refused to pay. As to the Davis account, he testified that plaintiff had been unable to locate Davis and that letters written to him had been returned. As to the Wolverine account, he testified that the same was in the hands of plaintiff's attorneys in Detroit and that they reported they were unable to collect the balance. He further testified, in substance, that after ascertaining plaintiff's inability to collect said accounts plaintiff "made demand on the Kellastone Company for the money under the contract"; that both Bodenweiser and Kastor came to plaintiff's office about October 5, 1913; that he (Nast) showed them a notice he had from Jones and requested them to "repurchase" the Jones account; that he asked Kastor to "make good these losses"; that Kastor said that he did not want plaintiff to crowd him and that plaintiff would get its money, as he was good for it; that Kastor kept on giving excuses, but as no money seemed to be forthcoming plaintiff commenced this suit on October 8, 1913.

On the "new" accounts, *i. e.*, those accounts assigned after the making of the contract sued upon and of which the Jones, Davis and Wolverine accounts were a part, Nast testified that in round figures plaintiff had collected about \$10,000; that nothing had been collected on said Jones, Davis and Wolverine accounts save as mentioned in the statement of claim; that before the contract sued upon was signed Kastor *verbally* agreed with Nast that plaintiff could take twenty per cent. of the collections made on said "new" accounts and apply that twenty per cent. on the shortage which existed on the "old" accounts, *i. e.*, those

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accounts which had been assigned to plaintiff under said prior contract; and that the amount so applied was about \$1,500. Kastor, however, denied making any such verbal arrangement with Nast, and the latter admitted that Kastor never gave him any written authority to make such application.

It further appeared from the evidence that between the time the present suit was brought and the trial thereof, the Kellastone Company had gone into bankruptcy. Nast further testified that plaintiff had been unable to collect anything on certain of the accounts, other than the Jones, Davis and Wolverine accounts, assigned to it after the execution of the contract sued on, but the evidence does not show definitely what ultimate loss, if any, plaintiff will suffer by reason of the transactions with the Kellastone Company under said contract. On the three so-called "certificates of indebtedness" introduced, evidencing the assignments to plaintiff of the Jones, Davis and Wolverine accounts, as well as many other accounts, appeared the following indorsement, signed by plaintiff by its assistant secretary, viz.: "For value received, all right, title and interest in and to this contract or claim is hereby sold, assigned and transferred to The Hibernian Banking Association, as trustee, and payment in full is hereby guaranteed." On the "certificates" dated September 2nd and September 4th, said assignments to the bank are each dated September 9, 1913, and on the "certificate" dated September 12th, said assignment to the bank is dated September 15, 1913.

At the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, the defendant moved the court to instruct the jury to find the issues for defendant, but the motions were overruled and exceptions taken.

HARRIS F. WILLIAMS, for appellant; ELDON M. VOTAW and W. SCOTT HODGES, of counsel.

RINGER, WILHARTZ, LOUER & CONCANNON, for appellee.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

The main contention of counsel for defendant is that there can be no recovery by plaintiff in this case because (1) the agreement of September 2, 1913, upon which the suit is based, amounts to the pledging of certain accounts receivable to secure the repayment of money advanced, and is, therefore, a mere money loaning agreement, and not an agreement for the sale of the accounts; and, (2) it being such an agreement, the same is not only *ultra vires* the plaintiff corporation but is illegal, in that plaintiff as a corporation, organized under the General Incorporation Act of Illinois, is not permitted by its charter to loan money.

We have been favored with elaborate arguments by the respective counsel and, after careful consideration of the same and of some of the cases cited and other cases, we have reached the conclusion that the agreement in question is an agreement for the loaning of money by plaintiff to the Kellastone Company upon accounts receivable of the latter company as security, rather than on agreement for the sale of the accounts to plaintiff, and that the accounts in question in this case should rightly be considered as having been pledged with plaintiff as security for certain moneys loaned thereon to the Kellastone Company, rather than as having been sold by the Kellastone Company to plaintiff. Other agreements, much resembling the agreement in question, have been construed recently by United States courts as not being agreements for the sale of accounts but rather as agreements pledging accounts as security for money loaned, and transactions under said agreements, quite similar to the transactions here disclosed, have been considered by said courts as loans rather than sales. *In re American*

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Fibre Reed Co., 206 Fed. 309, affirmed in *Home Bond Co. v. McChesney*, 127 C. C. A. 552, 210 Fed. 893; *In re Grand Union Co.*, on petition of Hamilton Investment Co., a decision by the United States Circuit Court of Appeals, for the Second Circuit, opinion filed December 15, 1914. See 219 Fed. 353.

While in the agreement here in question it is stated that the Kellastone Company is desirous of "selling" to plaintiff accounts receivable and that plaintiff agrees "to buy" such of the accounts of the Kellastone Company as "are acceptable" to plaintiff, still, as it seems to us, there are many features of the agreement which characterize it as an agreement for the pledging rather than the sale of accounts. We shall make mention of some of these features: (1) In the second paragraph of the agreement the term "default or loss," as used therein is construed to mean (a) the nonpayment of an account to plaintiff at maturity, (b) insolvency of the debtor, or (c) failure or refusal of the debtor to accept, receive and retain the property evidenced by an account; and the Kellastone Company agrees to pay to plaintiff "all expenses, attorney's fees and losses" incurred by plaintiff in and about any account in default. This provision suggests that plaintiff will look to the Kellastone Company and not to the debtor, in the event of plaintiff's failure to realize on an account at the maturity thereof or in the event of the insolvency of the debtor, and also suggests the right on the part of plaintiff, in either of those events, to demand and enforce repayment to it from the Kellastone Company of the moneys previously advanced on said account. The conduct of the parties is in conformity with this construction. Nast testified that when the accounts in question were not paid at maturity plaintiff "made demand on the Kellastone Company for the money under the contract," and afterwards demanded that Kastor, as guarantor, "make good these losses." In 35 Cyc. 39, it is said: "If there is a right

reserved by the buyer to demand and enforce repayment the transaction is not a sale but in the nature of a mortgage." In *Robinson v. Farrelly*, 16 Ala. 472, it was held that where the vendee retains the right to demand repayment of the vendor, notwithstanding the purchase, it is conclusive to show that the transaction was intended as a security and not a sale. If it was the intention of the parties to the agreement to make a sale of such accounts of the Kellastone Company as were acceptable to plaintiff, why should the former agree to pay the latter "all expenses, attorney's fees and losses" incurred by the latter in and about any account in default? The provision appears to us as negating any intention of a sale of the accounts. The plaintiff does not take the risk of loss on the accounts. (2) In the third paragraph of the agreement it is provided that the Kellastone Company "shall make entries upon its books disclosing the sale" of the accounts to plaintiff, and in the so-called "certificates of indebtedness," signed by the Kellastone Company at the time the accounts were assigned, the Kellastone Company "guarantees" that "entries have been made on its books disclosing the absolute sale" of the accounts to plaintiff. If there really was to be a sale of the accounts, such provisions were not needed. In the case of *Bright v. Wagle*, 3 Dana (Ky.) 252, Bright executed a writing to the effect that he had bargained and sold to Wagle "one negro boy named Daniel," for a certain sum named, and it was stated in the writing that it was understood that Bright was to have the right of "repurchasing" said boy by paying said sum by a certain date, together with twelve per cent. on the amount, and that "the negro aforesaid is to remain in the possession of said Wagle." In construing the writing not to be a contract for the sale of the slave, the Court said (p. 257): "There is an express stipulation * * * that the negro was to remain in the possession of Wagle. If the minds of the parties were

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not running upon a loan, and a mortgage, pledge or lien upon the slave, to secure it, why the introduction of this stipulation? If it were a sale, and so intended by the parties, no reasonable man could doubt, but that the property and immediate possession thereof would pass to the vendee, without any special stipulation to that effect." (3) In the fourth paragraph of the agreement it is provided that the purchase of accounts by plaintiff is made upon representations in writing concerning the financial responsibility of *the Kellastone Company*. If a sale of accounts to plaintiff were contemplated plaintiff would not be concerned about the financial responsibility of the seller, but rather with the financial responsibility of the party owing the accounts. (4) In the first paragraph of the agreement it is provided that seventy-seven per cent. of the face value of the accounts shall be paid upon their acceptance by plaintiff, and that "the remainder, less all deductions," shall be paid to the Kellastone Company immediately upon payment of any such accounts to plaintiff, but there is the proviso that if, at the time of any settlement between the Kellastone Company and plaintiff, "*any* of the accounts purchased hereunder shall be in default" (i. e., not paid to plaintiff at maturity, or the party owing the account be insolvent, etc.), "payment of such remainder, while *any* of the accounts are in default, shall be discretionary" with plaintiff. We think that this means that the parties to the agreement intended that plaintiff *might* retain the balance of cash received by it on any paid account or accounts, over and above the seventy-seven per cent. thereof paid by it at the time said account or accounts were assigned to it, as long as *any* other account remained in "default," and so retain said balance as *security* on said account so in default. We do not think that these provisions, taken in connection with the other provisions contained in said first paragraph, are consistent with the idea of a sale of the ac-

counts. In the *American Fibre Reed Co.* case, *supra*, the contract there in question had provisions very similar to the provisions in said first paragraph of the agreement here in question, and on the review of that case, in *Home Bond Co. v. McChesney*, *supra*, the Court said (p. 894): "The record discloses to us a mutual intendment that the right at least to 20 per cent. of the full value of each of the accounts receivable was always to remain in the bankrupts, except only for *purposes of security*; this right *could not be both sold and owned* by the bankrupts." (5) In the "guaranty and waiver," signed by defendant and others, it is stated that the undersigned jointly and severally guaranty to plaintiff the full and prompt "payment, performance and discharge" by the Kellastone Company of each of the provisions and conditions of the agreement, i. e., that the Kellastone Company will, among other things, pay plaintiff "all expenses, attorney's fees and losses" incurred by plaintiff in or about any account in default. We think that this provision is also inconsistent with the idea of a sale of the accounts. It suggests that the parties to the agreement intended that plaintiff should have *additional security* for the money advanced on accounts beyond the security afforded by the accounts themselves. (6) Before the agreement was signed the evidence shows that the Kellastone Company was "hard up" and needed money to run its business and had applied to plaintiff for monetary assistance, and that plaintiff insisted upon defendant signing said "guaranty and waiver" before it would enter into the contract. (7) There are many usurious features in the agreement, and we think that the statement of the Court in the case of *In re American Fibre Reed Co.*, *supra*, (p. 318) relative to the contracts there in question is applicable to the agreement here in question, viz.: "In so far as the contracts in question here use words fit for a contract of purchase, they are mere shams and devices to cover loans of money at usurious rates of interest."

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The plaintiff is a corporation organized under the General Incorporation Act of Illinois. As such a corporation it is prohibited from engaging in the "business of loaning money" (sec. 1, ch. 32, Hurd's R. S. J. & A. ¶ 2418). Holding as we do that the agreement here in question is an agreement for the loaning of money by plaintiff to the Kellastone Company, it follows, we think, that the agreement is absolutely void, that no action could be maintained thereon by plaintiff against the Kellastone Company and that the doctrine of estoppel could not apply. *In re Grand Union Co.*, *supra*; *Central Trans. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35; *Steele v. Fraternal Tribunes*, 215 Ill. 190. And we think it also follows that no action can be maintained by plaintiff against defendant as guarantor of a void agreement. 20 Cyc. 1420.

In the "guaranty and waiver," which the defendant signed and which is on the reverse side of the paper containing the agreement between the Kellastone Company and plaintiff, it is provided that defendant guaranties to plaintiff the full, prompt and faithful payment, performance and discharge by the Kellastone Company of each of the provisions and conditions of the agreement "on the reverse side hereof, or *any other instrument given or executed in pursuance thereof.*" In the so-called "certificates of indebtedness," signed only by the Kellastone Company when the accounts in question were assigned by it to the plaintiff, it is stated that "the undersigned hereby guarantees the payment in full" to plaintiff "of the above named contracts and open accounts in accordance with the terms indicated and appearing thereon." It is to be noticed that these instruments are not signed by the defendant, Kastor. It is here urged by plaintiff's counsel that these instruments should be considered as a part of defendant's guaranty because they are instruments "given or executed in pursuance of" said agreement,

and that this fixes the liability of defendant in this case. We cannot assent to this, for reasons stated in *American Credit & Trust Co. v. Witz*, 186 Ill. App. 184, 187. And in our opinion the decision in that case discloses other good reasons in addition to those hereinabove mentioned, why there can be no recovery in the present case against the defendant as guarantor.

In view of the foregoing, it is unnecessary for us to discuss the other points raised by counsel for defendant.

In *Harty Bros. & Harty Co. v. Polakow*, 237 Ill. 559, 567, it is said: "The Appellate Court may reverse without remanding under two conditions: First, where it finds the facts in controversy different from the finding of the trial court and recites the ultimate facts so found in its judgment; second, when it reverses for errors of law which cannot be obviated or cured on another trial." We are of the opinion that under the facts of this case the trial court erred in refusing to grant the motions of defendant, made at the conclusion of plaintiff's evidence and again at the close of all the evidence, to instruct the jury to find for the defendant, and in entering the judgment appealed from, and that there can be no recovery by plaintiff of defendant on the contract and guaranty sued upon, at any subsequent trial. The judgment of the Municipal Court will be reversed, but the cause will not be remanded.

Reversed.

B. J. Regnell Co. v. Meiswinkel, 191 Ill. App. 238.

B. J. Regnell Company, Appellee, v. Richard A. Meiswinkel, Appellant.

Gen. No. 20,287. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 26, 1915.

Statement of the Case.

Action by B. J. Regnell Company against Richard A. Meiswinkel upon a contract in writing to do carpenter work on a building for \$21,900. Payments were to be made on architect's certificates, the final certificate being conclusive evidence of performance of the contract. Plaintiff alleged that it secured a final architect's certificate for \$2,838, that it furnished extras amounting to \$526.56, that defendant paid \$1,500 and refused to return the final architect's certificate. Plaintiff's claim was for \$1,338, balance due under the certificate, and \$526.56 for extras, with interest. At the trial defendant elected to stand by its affidavit of merits and the court entered judgment for the plaintiff for \$1,540.89, and ordered that the cause proceed to trial as to the balance of the claim and interest. To reverse such judgment, defendant appeals.

CAMPE, KOEBEL & MECHLING, for appellant.

JOSEPH G. SHELDON, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. BUILDING AND CONSTRUCTION CONTRACTS, § 49*—*when delay in performance waived*. Where a contractor was allowed to proceed with

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

work after the time fixed for its completion, the owner waived the right to object or claim damages for the delay in completing the work, it appearing that the delay was due to other contractors over whom the plaintiff contractor had no control.

2. BUILDING AND CONSTRUCTION CONTRACTS, § 65*—*when architect's certificate conclusive as to performance*. Where a contract provides that the architect's final certificate shall be conclusive evidence of performance of the contract, such certificate, in an action of assumpsit brought thereon, is conclusive evidence, unless it is shown that it was obtained by fraud or mistake.

3. JUDGMENT, § 106*—*when judgment by default proper*. Where averments of an affidavit of merits and set-off are no answer to a plaintiff's claim based on a contract, and the admission of defendant render it unnecessary to introduce evidence to support the plaintiff's claim, the court is authorized under sections 55, 56 of the Practice Act (J. & A. ¶¶ 8592, 8593) to enter judgment as by default for the amount of the plaintiff's claim.

**Anna May Reid Snell, Appellant, v. Charles W. Snell,
Appellee.**

Gen. No. 20,300.

1. DIVORCE, § 172*—*when persons may not remarry*. Under the statute an attempted marriage less than two months after the divorce of the husband from another woman is void.

2. MARRIAGE, § 29*—*what allegations are material in seeking annulment*. In a bill to annul a marriage and set aside a divorce, the fact that the complainant did not know of the defendant's prior marriage or divorce within the time prohibited by statute for remarrying is immaterial to her right to relief and need not be alleged.

3. DIVORCE, § 58*—*when decree void*. Where a marriage is void, a divorce thereafter granted based on the void marriage is void.

4. MARRIAGE, § 29*—*what contention cannot be maintained in seeking annulment*. In a bill to annul a marriage and set aside a divorce, the contention that the complainant does not come into court with clean hands cannot be made the basis of a legal defense where the State is an interested party.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Snell v. Snell, 191 Ill. App. 239.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded with directions. Opinion filed January 26, 1915.

H. A. BARNHARDT, for appellant.

No appearance for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

It appears from the averments of the bill of complaint filed by appellant December 2, 1913, that on June 18, 1907, at Chicago, the defendant to the bill, appellee, was granted a decree of divorce from his then wife, Nettie Snell, on the ground of desertion, and in less than two months thereafter, on August 14, 1907, he married the complainant, Anna May Reid Snell, at Crown Point, Indiana. It further appears that complainant did not know of the former marriage and divorce of defendant at the time of the ceremony at Crown Point, and that on November 4, 1913, the complainant was granted a divorce from the defendant on the ground of adultery; that complainant did not know on November 4, 1913, nor until sometime thereafter that her marriage to the defendant was void and that she never was the legal wife of the defendant.

The bill prays for setting aside the divorce and to annul the marriage. The defendant, appellee here, interposed a demurrer to the bill, setting up as grounds the prior divorce of complainant; that complainant does not come into court with clean hands because she does not allege that she did not know of the former marriage and divorce of defendant at the time of procuring her divorce and that complainant should not be heard to allege that she did not know her marriage to the defendant was void.

The chancellor sustained the demurrer and dismissed the bill for want of equity.

The attempted marriage between the complainant and the defendant, as shown by complainant's bill, was not voidable but was absolutely void under the statutes of Illinois. *Nehring v. Nehring*, 164 Ill. App. 527; *Szlauszis v. Szlauszis*, 255 Ill. 314; *Wilson v. Cook*, 256 Ill. 460; *Olsen v. People*, 219 Ill. 40.

Whether the complainant knew or did not know of the defendant's prior marriage or divorce within the time prohibited by statute for remarrying is immaterial to her right to relief, and it is, therefore, unnecessary to allege that she knew or did not know of the defendant's prior marriage and divorce. The complainant does not allege that she did not know that she was never the legal wife of the defendant until after the decree of divorce was granted; that she had ground for the annulment of her supposed marriage to the defendant. If the marriage was void and the averment of the bill was that it was void, the divorce thereafter granted based upon the void marriage was likewise void, futile and of no effect. The complainant in this case has the right to have, under the allegations of her bill, the marriage declared void and of no effect, and thus her marital rights and condition established by the decree.

The ground stated in the demurrer, that the complainant does not come into court with clean hands, cannot be made the basis of a legal defense to the bill where the State is an interested party, as in this case. In *Szlauszis v. Szlauszis*, *supra*, the court held that parties to an illegal agreement were *in pari delicto* and without remedy against each other so far as property rights are concerned, and the law will refuse to lend its aid to either of them, and on page 319 of the opinion held as follows:

"If, as a consequence of his illegal act, defendant in error has suffered a wrong, he cannot look to the law for redress. Public policy will not permit him to make his own illegal act the foundation of a legal or equitable right. The rule of *par delictum* will not be applied,

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however, to prevent relief in a suit to annul and set aside a void marriage. That is a matter in which the State is an interested party. Under the facts as found by the court the marriage should be set aside as void, but the parties are entitled to no other or further relief."

The chancellor erred in sustaining the demurrer to the bill and dismissing the bill for want of equity. The decree is reversed and the cause remanded with directions to overrule the demurrer and proceed in the case in conformity with the views herein expressed.

Reversed and remanded with directions.

Ira M. Cobe, Appellee, v. Frederick H. Bartlett, Appellant.

Gen. No. 20,332.

1. **VENDOR AND PURCHASER, § 16***—*what is option contract.* A contract whereby a plaintiff was under no obligation to sell, but the defendants were under obligations to buy certain premises if acquired through foreclosure of a trust deed, is free from ambiguity and uncertainty, and is an option contract to sell in the event of the happening of the condition.

2. **VENDOR AND PURCHASER, § 65***—*when contract not ambiguous.* Under a contract whereby a plaintiff acquiring premises through foreclosure of a trust deed was to sell the same to the defendant, there was no ambiguity as to the subject-matter of the purchase, the term "premises" being usually used to signify land and its appurtenances.

3. **VENDOR AND PURCHASER, § 65***—*when vendor has no title to convey.* Where a contract provided that a plaintiff was to sell certain premises if acquired under a trust deed, and such plaintiff had no title to the premises as against the mortgagor or his assigns or grantees, but only took a master's deed under foreclosure of a second trust deed, he had no title to the premises and the deed tendered by such plaintiff would have conveyed no title.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

4. MORTGAGES, § 96*—*what is interest of mortgagee.* The fee title held by a mortgagee is in the nature of a base or determinable fee measured by the mortgage debt, and when paid the mortgagee's title is extinguished by operation of law.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed with finding of facts. Opinion filed January 26, 1915. Rehearing denied February 6, 1915. *Certiorari* allowed by Supreme Court.

VAIL & VETTE, for appellant.

FOREMAN, LEVIN & ROBERTSON, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

This action was brought by Ira M. Cobe against Frederick H. Bartlett and Clinton S. Woolfolk to recover the alleged loss and damages suffered by the plaintiff by reason of the failure on the part of defendants to perform their obligations under a written contract between the parties. Woolfolk died during the trial and the suit proceeded against Bartlett alone.

The action was tried before the court without a jury. The court found the issues in favor of the plaintiff and entered judgment against Bartlett for \$25,144.14.

The parties will be referred to in this opinion as plaintiff and defendant, as known in the trial court.

A stipulation covering the material and controlling facts was made in the trial court and hence only questions of law are presented and argued on this appeal.

The contract which forms the basis of the action was in writing as follows:

"THIS AGREEMENT, made and entered into this 27th day of November, A. D. 1905, by and between Frederick H. Bartlett and Clinton S. Woolfolk, parties of the first part, and Ira M. Cobe, party of the second part, WITNESSETH:

THAT WHEREAS, the parties of the first part have sold to the party of the second part a certain principal note

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of twenty thousand dollars (\$20,000) dated April 3, 1905, payable on or before five (5) years after date, with interest at the rate of five (5) per cent. per annum, payable semi-annually, together with nine (9) interest coupons for the sum of five hundred dollars (\$500) each; all executed by Benjamin H. Wallace to the order of himself and by him endorsed, and secured by trust deed dated April 3, 1905, from the said Benjamin H. Wallace and Dollie F. Wallace, his wife, to the Chicago Title & Trust Company, trustee, conveying lot nine (9) in Whitbeck's Subdivision of the east half ($\frac{1}{2}$) of block seventy-nine (79) in the Canal Trustees' Subdivision of the west half ($\frac{1}{2}$) of section twenty-seven (27), township thirty-nine (39) north, range fourteen (14), east of the Third Principal Meridian, Cook County, Illinois; said trust deed having been recorded in the recorder's office of Cook County, Illinois, on July 6, 1905, as Document No. 3,720,530.

NOW THEREFORE, in consideration of the sum of thirty-three thousand five hundred dollars (\$33,500), and as one of the terms of the above mentioned sale, the said parties of the first part agree, in the event of the foreclosure of the said trust deed and the said party of the second part acquiring the said premises, as described therein, through foreclosure for the sum not exceeding the actual amount due under said notes and trust deed, as found by the decree, to purchase the said premises from the said party of the second part immediately upon the expiration of the period of redemption under said foreclosure, and to pay the said party of the second part for said premises the amount which would be required to redeem the said premises under said foreclosure on the last day of said period of redemption, together with any additional charge for master's deed, etc., but excluding any sum which may be allowed in said foreclosure proceeding for attorneys' or solicitors' fees.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

CLINTON S. WOOLFOLK,

[SEAL.]

FREDERICK H. BARTLETT, [SEAL.]
NORTHERN LIQUIDATION COMPANY, [SEAL.]
By WM. B. WALRATH, President."

From the uncontroverted facts it appears that in 1905 the Northern Liquidation Company purchased the premises described in the above contract, known as Beveridge building property, from the Prudential Life Insurance Company of America, then owner of the property. The sale was negotiated through the defendant, Bartlett. The title was taken in the name of Benjamin H. Wallace. Wallace gave his note to the Prudential Life Insurance Company of America, secured by a mortgage on the above described premises, for \$60,000, the unpaid part of the purchase price.

On the same date Wallace made another note for \$20,000 with interest notes, payable to his order and by him indorsed, and to secure the same he, with his wife, executed a trust deed on the premises to the Chicago Title & Trust Company as trustee, and subject to the above mentioned \$60,000 first mortgage. Each of the principal notes was due in five years from date.

The Prudential Life Insurance Company held its paper until it matured, and on May 21, 1910, filed its bill in the Circuit Court of Cook county to foreclose, making defendants all parties having any interest as owners of the equity of redemption, or subsequent incumbrancers, including the Assets Realization Company, the then owner of the \$20,000 note and trust deed securing it. In that proceeding Samuel R. Jenkins was appointed receiver, November 19, 1910, under an order directing him, among other things, to pay out of the proceeds of rents, etc., "expense of the receiver theretofore appointed in the cause entitled *Assets Realization Company v. Benjamin H. Wallace, et al.*," a foreclosure suit then pending to foreclose the second mortgage above mentioned for \$20,000.

A decree of foreclosure was entered in the foreclosure proceeding under the first mortgage of \$60,000, and on November 26, 1910, the master sold the prop-

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erty and the Prudential Life Insurance Company purchased it at the master's sale for \$65,500. On the same day a deficiency decree for \$2,266.14 was entered for the balance due under the first mortgage. No redemption having been made by the defendants in the foreclosure proceedings or others, the master made a deed of the premises to the Prudential Life Insurance Company February 28, 1912.

It appears that the note and trust deed securing the \$20,000 was held by the Northern Liquidation Company until November 27, 1905, at which time the note with some other property was sold to plaintiff, Ira M. Cobe, and the \$20,000 proceeds of the sale went to the Northern Liquidation Company. At that date the contract sued on was executed, evidencing the sale of the \$20,000 note and was signed by Woolfolk and Bartlett individually, and by the Northern Liquidation Company by W. B. Walrath, its President. The purchase price for the note and other property was paid by the Assets Realization Company's check, and no other payment was made by Cobe. As one of the terms of the sale of the note and trust deed, Cobe, Woolfolk and Bartlett agreed on certain conditions to purchase the real estate described in the trust deed from Cobe in accordance with the terms of the written contract above set forth.

Cobe transferred the \$20,000 note to the Assets Realization Company, and on April 12, 1910, that company filed its bill to foreclose the trust deed. On May 10, 1910, Jenkins was appointed receiver under that bill, and the taxes for the year 1909, not having been paid, under an order of court September 2, 1910, he, as receiver, issued a receiver's certificate, of date September 10, 1910, for \$1,118.82, and with the proceeds of the sale of the certificate, paid the taxes.

The Assets Realization Company obtained a decree September 30, 1910, and on October 28, 1910, the premises were sold by the master to Hugo M. Friend, who

purchased for Cobe. Friend assigned the certificate of sale to Cobe. The master reported on October 31, 1910, that he had sold the premises for \$23,350; that he had paid the Assets Realization Company \$21,-146.98, and that the amount realized was not sufficient to pay the amount found to be due by the decree, and that there was a deficiency due the Assets Realization Company of \$53.66, for which Wallace was liable. This report was approved by the court November 4, 1910, and a deficiency judgment of \$53.66 against Wallace was entered, and complainant was awarded execution therefor.

The receiver Jenkins remained in possession of the property until the right of redemption expired under the foreclosure sale of the Prudential Life Insurance Company case, February 27, 1912. He did not pay either the deficiency judgment or the receiver's certificate for \$1,118.82 still outstanding. No redemption in either case was made. The year for redemption by defendants from the sale to the Prudential Life Insurance Company expired November 26, 1911, and for judgment creditors February 27, 1912.

The fifteen months' period for redemption expired on the Assets Realization Company's sale January 29, 1912, and on January 30, 1912, Cobe obtained a deed from the master to himself which he recorded February 1, 1912. On January 30, 1912, Cobe and wife signed and acknowledged a deed purporting to convey the premises to Bartlett and Woolfolk, and on the same date, through his attorney who had with him the original contract, the master's deed to Cobe, the deed from Cobe and wife to Bartlett and Woolfolk, and a certificate from the master showing an amount due, said to Bartlett he would deliver the papers on payment of the amount called for by the contract. Bartlett referred him to his attorney. On the morning of January 31, 1912, Cobe's attorney called on Woolfolk and made the same offer and about noon of the same day

saw the attorney for Bartlett who informed him that Bartlett was in negotiation with the Prudential Life Insurance Company about acquiring its interest and that he would not say that they would pay the money.

On February 20, 1912, Bartlett, through his attorney, tendered to the attorney for the Assets Realization Company the amount due on the deficiency judgment of that company which was not accepted. On the day following, the attorneys for the parties went into court and an order was entered under which Bartlett's attorney paid the deficiency judgment of the Assets Realization Company to the clerk of the court.

On February 20, 1912, a contract was executed whereby Bartlett agreed to purchase from the Prudential Life Insurance Company the property in question if it obtained a deed from the master in its foreclosure suit. Cobe, having been informed of this contract, on February 21, 1912, mailed to Bartlett the deed of himself and wife to Bartlett and Woolfolk mentioned above in a letter which stated that he was delivering therewith unconditional deed of the premises, "the title to which now stands in my name upon the records, and will be glad to receive your check for \$23,112.50." This letter was referred by Bartlett to his attorney who replied by mail, under date of February 23, 1912, the intervening day being a holiday, that Bartlett felt he was under no obligation to accept the deed or pay the \$23,112.50, and declined to do so and returned the deed. Thereupon, on April 29, 1912, this action was brought against Bartlett and Woolfolk.

Defendants' affidavit of merits denied that plaintiff acquired the title to the premises, denied the delivery of the deed, alleged that the master's deed to plaintiff did not convey the premises or any interest therein or title thereto, and set up the sale under the foreclosure decree on the first mortgage and failure of plaintiff to redeem therefrom.

The first, and we may say the controlling, question presented for consideration is the meaning and legal

effect of the contract of November 27, 1905, between Bartlett and Woolfolk on the one hand and Cobe on the other. In our opinion it is an option on the part of the plaintiff to sell the real estate described therein to Bartlett and Woolfolk in the event of the happening of the conditions precedent mentioned therein. *Adams v. Peabody Coal Co.*, 230 Ill. 469. Plaintiff was under no obligation to sell but the defendants were under obligation "to purchase the said premises" from plaintiff subject to the conditions precedent specified, namely the "acquiring the said premises" by plaintiff through a "foreclosure of the said trust deed." The purchase was to be made "immediately upon the expiration of the period of redemption under said foreclosure." The contract is, we think, simple, clear and without ambiguity or uncertainty. There are no contradictory terms or provisions in it. There is, therefore, no ground for resorting to any contemporaneous construction which the parties may have given to the contract by their acts at the time, or during the execution of the contract, for the purpose of construing it or to enable the court to ascertain the real intention of the parties. The legal effect of the agreement must be enforced. *Walker v. Tucker*, 70 Ill. 527; *Bolton v. Huling*, 195 Ill. 384, 394; *Railroad Co. v. Trimble*, 10 Wall. (U. S.) 367, 377.

It is contended by the plaintiff that he "acquired the said premises as described therein (the second trust deed), through foreclosure;" that the "premises as described therein" under the circumstances of this case, meant the title to the premises subject to the first lien and its incidents. In other words, it was not the intention that Cobe should pay off the first lien of \$60,000 in order to sell the premises to defendants for the amount due under the second lien.

The defendants agreed, (1) in the event of the foreclosure of the second trust deed, and (2) the plaintiff acquiring the premises through the foreclosure, "to

purchase the said premises from the said party of the second part (Cobe) * * * and to pay the party of the second part for said premises the amount which would be required to redeem the said premises under said foreclosure on the last day of said period of redemption," etc.

There is no ambiguity as to the subject-matter of the purchase, or what was to be acquired by Cobe. He was to acquire the premises through a foreclosure of the trust deed, and that same thing was to be the subject-matter of the sale to defendants. In common parlance, the term "premises" is used to signify land with its appurtenances; and its usual and appropriate meaning in conveyances and contracts for the purchase and sale of real estate is the thing demised or granted by the deed. 22 Am. & Eng. Ency. of Law, 1175. That is the meaning of the word as used in the contract under consideration. Defendants were selling the paper to get money on it. They obtained no assurance by the contract that plaintiff would acquire the property, or, if he did, that he would sell it to them. The contract was a mere option in plaintiff's favor. It gave Bartlett and Woolfolk no advantage or benefit, and as it was neither an advantage nor benefit to them, it must be inferred they did not ask for it. But it was a thing that might prove to be a benefit or advantage to Cobe, and, therefore, a situation that he was seeking to impose upon defendants. Bartlett and Woolfolk were selling a \$20,000 note for \$17,000. They were selling the paper for money, not as a means of acquiring the property, for they transferred to Cobe with the notes, as an incident thereto, the trust deed which gave the right to redeem from the first mortgage by taking up the indebtedness secured by the first mortgage after its maturity and including it with what was due on the notes and trust deed purchased by him and foreclosure for the whole amount, or hold it as a lien upon the premises. This would have enabled

plaintiff to acquire the premises and comply with the condition of his contract. This was his plain and effective course of procedure. But, instead of redeeming from the first mortgage, or taking it up and holding it, he allowed the foreclosure suit of the Prudential Life Insurance Company to ripen into a decree against the Assets Realization Company, the owner of the notes and trust deed, a defendant therein, under which decree a sale was made of the premises November 26, 1910. Cobe bought the premises under a decree entered in the Assets Realization Company case on October 28, 1910. Any right which he obtained by that purchase was such only as came through the Assets Realization Company, and was foreclosed by the decree in the Prudential Life Insurance Company case. No redemption was made by any defendant or by Cobe from the sale under the first mortgage within the year given by statute and the decree, and their rights were extinguished. This was not acquiring title to the premises subject to the first lien and its incidents, according to the construction of the contract contended for by plaintiff. On the contrary, it was permitting all rights, title and equity of redemption in the Assets Realization Company or plaintiff to be foreclosed and extinguished, so that the plaintiff had no right in or title to the premises to convey to defendants. If, then, it be conceded that the contract is to be construed as plaintiff contends it should be, and further that the intention expressed therein is that Cobe should convey a title subject to the first mortgage, the plaintiff's action is not supported thereby, for, according to the record, he never had even such a title to convey. The right of redemption from the sale to the Prudential Life Insurance Company under the decree of foreclosure of the first mortgage expired on November 26, 1911, as to everybody except judgment creditors. Cobe received his master's deed in the foreclosure of the second trust deed on January 30, 1912. He took noth-

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ing therefore under the deed. *Cook v. City of Chicago*, 57 Ill. 268. He had no title to the premises to convey to Bartlett and Woolfolk when he tendered a deed to them January 30 and 31, 1912. He had not performed or fulfilled the condition precedent to his right to sell and convey to defendants, namely, had not acquired the premises through foreclosure of the second trust deed, nor the right to receive from them the amount which would be required to redeem the premises under the foreclosure on the last day of the period of redemption, excluding, etc.

Plaintiff contends, however, that after the expiration of the fifteen months' period of redemption under the second mortgage foreclosure and the issuance of the master's deed thereunder to Cobe, and until the expiration of the fifteen months' period of redemption under the first mortgage foreclosure and the issuance of master's deed thereunder, title to the premises was in Cobe. *Lightcap v. Bradley*, 186 Ill. 510; *Seligman v. Laubheimer*, 58 Ill. 124; *Ogle v. Koerner*, 140 Ill. 170; and *Davis v. Dale*, 150 Ill. 239, and other cases are cited as sustaining the contention.

This contention is, we think, fully answered in what we have said above. The claim is rather specious than sound. That it is not sound is admitted in argument by Cobe, that "it is apparent, therefore, that the value of the estate conveyed by Cobe to Bartlett and Woolfolk (in the deed tendered but not accepted) was nothing," the premises being in the possession of the receiver for the purpose of enforcing the equitable lien of the two incumbrances upon the rents and profits accruing during the redemption period, and the receiver never having collected money enough to satisfy either deficiency decree. It seems to us idle to claim that Cobe during that period had title to the premises, or that whatever title he had was such a title as was contemplated by the parties to the contract. True, Cobe had whatever title remained in Wallace subject

to the title of the Prudential Life Insurance Company as mortgagee, but Wallace's title and Cobe's title under him had been foreclosed and cut off by the decree in the foreclosure of the first mortgage and the lapse of the redemption period in which Wallace could redeem. The debt secured by the first mortgage was not paid on February 28, 1912. The Prudential Life Insurance Company had a deficiency decree for \$2,266.14. It was in possession of the property through a receiver for the purpose of collecting its debt, not as purchaser at the sale or by virtue of the decree, but under and by virtue of the mortgage which was still alive and in force for that purpose. As held in *Ware v. Schintz*, 190 Ill. 189, at page 193: "The relation of plaintiff and defendant to each other is that of mortgagor and mortgagee, and under the repeated rulings of this court a mortgagee, as against the mortgagor, is held, as in England, in law, to be the owner of the fee, having the *jus in re* as well as *ad rem*, and entitled to all the rights and remedies which the law gives to such owner, and may, after condition broken, maintain ejectment against the mortgagor. The mortgagor or his assignee, however, is the legal owner of the mortgaged estate as against all persons excepting the mortgagee or his assigns. *Delahay v. Clement*, 3 Scam. 201; *Vansant v. Allmon*, 23 Ill. 30; *Carroll v. Ballance*, 26 id. 9; *Oldham v. Pfleger*, 84 id. 102; *Fountain v. Bookstaver*, 141 id. 461; *Esler v. Heffernan*, 159 id. 38. The fee title held by the mortgagee is in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law. *Pollock v. Maison*, 41 Ill. 516; *Harris v. Mills*, 28 id. 44; *Gibson v. Rees*, 50 id. 383; *Bartlett v. Hinckley*, 124 id. 32; *Lightcap v. Bradley*, 186 id. 510. Until it is extinguished the legal title is in the mortgagee for the purpose of obtaining satisfaction of his debt." See also *Owsley v. Neeves*, 179 Ill. App. 61.

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As against the mortgagor or his assigns, grantees and those claiming under him, the title to the premises during the period mentioned in Cobe's contention was in the Prudential Life Insurance Company and not in Cobe, and the deed tendered by Cobe to Bartlett and Woolfolk, if accepted, would have conveyed no title.

The finding and judgment of the trial court was erroneous, and the judgment is reversed.

Reversed with finding of facts.

Finding of facts.—The court finds that the plaintiff, Ira M. Cobe, did not acquire the premises described in the contract sued on through foreclosure of the trust deed described in the contract and did not perform or fulfil the conditions of the contract to be performed and fulfilled by him, and the defendant, Frederick H. Bartlett, appellant, is not indebted to the plaintiff Cobe under the contract sued on.

Paulina Sharmach Wojciehowski, Appellee, v. National Council of the Knights and Ladies of Security, Appellant.

Gen. No. 20,342. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed January 26, 1915.

Statement of the Case.

Suit by Paulina Sharmach Wojciehowski against the National Council of the Knights and Ladies of Security on a fraternal beneficiary certificate issued by defendant society to one Francis Sharmach payable to his wife, the plaintiff, in the sum of \$2,000 in the event of the insured's death. The defendant contended that the applicant made false statements in the application

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for insurance both as to a disease of the liver and the excessive use of liquors, and it appeared that Sharmach's death was caused by chronic organic heart disease, cirrhosis of the liver being a contributing cause, and such disease of the liver was frequently caused by excessive use of intoxicating liquors. It also appeared that deceased suffered from delirium tremens. At the trial the jury returned a verdict for the plaintiff for \$1,361.29.

A. W. FULTON, for appellant.

No appearance for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 889*—*what evidence admissible in suit on benefit policy.* In a suit on a fraternal benefit certificate, evidence of conversations between the beneficiary, the plaintiff and another woman were erroneously admitted, where it did not appear that such woman was the agent of the society or clothed with authority to bind it.

2. INSURANCE, § 896*—*what evidence as to medical examination improper.* In a suit on a fraternal benefit certificate, evidence of what was said between the applicant and a medical examiner was erroneously admitted, the examination being signed and being a warranty, upon which with the application, the insurance was issued.

3. INSURANCE, § 908*—*what instructions erroneous.* In a suit on a fraternal benefit certificate, an instruction submitting the question that the society had misled the insured, or waived strict compliance with the contract, and had induced the applicant to make false statements, was erroneous, when there was no proper evidence warranting such question.

4. INSURANCE, § 908*—*when instruction as to warranty erroneous.* In a suit on a fraternal benefit certificate, an instruction that the statements in the application for insurance were warranties and that the plaintiff could not recover if they were untrue, unless the defenses were waived, was erroneous when not warranted by the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. INSURANCE, § 908*—*when instruction not based on evidence.* In a suit on a fraternal benefit certificate, where there was no evidence that the applicant was not asked whether he had had delirium tremens, a suggestion to such effect to the jury was improper.

6. INSURANCE, § 908*—*when instruction erroneous.* In a suit on a fraternal benefit certificate, an instruction as to waiver of the defense whether the insured was addicted to the excessive use of intoxicants was erroneous when not based on the evidence.

Leslie A. Needham, Appellant, v. Wilbur Glenn Voliva,
Appellee.

Gen. No. 20,368.

1. ATTORNEY AND CLIENT, § 150*—*when lien not enforceable.* Equity has no jurisdiction to adjudicate an attorney's possessory or retaining lien, which is defined as a mere right to retain possession of property belonging to the client which comes into the attorney's hands within the scope of his employment until his charges are paid.

2. ATTORNEY AND CLIENT, § 144*—*what property covered by lien.* An attorney's possessory lien covers property of any kind belonging to the client and held by the attorney, including legal documents or money collected.

3. ATTORNEY AND CLIENT, § 138*—*when statute as to lien does not apply.* The Attorney's Lien Act of 1909 (J. & A. ¶ 611) was not intended to apply to the establishment of attorneys' liens upon papers or securities belonging to their clients which come into their possession in the ordinary course of business.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded with directions. Opinion filed January 26, 1915. Rehearing denied February 6, 1915.

JOHN B. DANDRIDGE, for appellant.

C. P. BARNES, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE SMITH delivered the opinion of the court.

Leslie A. Needham, appellant, filed this bill against Wilbur Glenn Voliva for the adjudication of an attorney's lien under the Attorney's Lien Act, upon a certain note and trust deed of the defendant, Voliva, in the possession of the complainant, for services alleged to have been rendered by the complainant to the defendant. The bill specifically claims a lien upon the note and trust deed under the Attorney's Lien Act. It prays, however, for general relief.

The defendant answered the bill, denying many of its averments, and denying that the defendant sought the advice of counsel of complainant with reference to some things stated in the bill. In other matters the answer shows payment for the services rendered. The answer further sets up that George W. Field was acting as defendant's solicitor, and that Field had prepared a notice of application to the Federal Court for the purpose of securing a certain order of court, and that Field, being unable to be present, without the knowledge of this defendant, employed the complainant to appear for him as well as the defendant in that matter; that complainant was acting as much or more for the receiver in the cause as for complainant, and that the receiver paid him.

The answer admits that the defendant became the owner of the notes and mortgage set up in the bill, upon which note and mortgage the complainant seeks to obtain a lien, the note for \$1,700 and trust deed securing the same bearing date August 27, 1906. The defendant avers that in July, 1911, he being still the owner of the note and trust deed and desirous of foreclosing the same, delivered the papers to his attorney, George W. Field, for the purpose of having a bill prepared for foreclosure. It appears from the answer that Field was unable to attend to the matter and employed the complainant to prepare the bill and delivered the papers to him for that purpose; but the bill

was not prepared by the complainant, and it is denied that the complainant has any lien upon the same or a right to withhold the same from the defendant. The answer specifically denied the services rendered and the value thereof.

The case was referred to a master, and upon the master's report, exceptions thereto and the evidence contained therein, a decree was entered, dismissing the bill for want of equity.

Appellant urges in his brief and argument that there are only two grounds of possible equity jurisdiction in the case. The first is, that one may resort to equity to adjudicate the validity of a common-law retaining lien. The second ground is, that the Attorney's Lien Act of 1909 (J. & A. ¶ 611) creates a lien as against the client without the service of the notice provided for in the statute.

In our opinion equity has no jurisdiction to adjudicate a possessory or retaining lien. That lien is defined as the attorney's right to retain possession of property belonging to his client which comes into his hands within the scope of his employment until his charges are paid. *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570. If the relationship of attorney and client exists, the possessory lien will cover in general any property of any kind belonging to the client and held by the attorney. It includes ordinary legal documents of the client in the possession of the attorney, or money collected by the attorney. 4 Cyc. 1015. The possessory lien is a right merely to retain, and cannot be actively enforced. 4 Cyc. 1023; *Compton v. States*, 38 Ark. 601; *McKelvy's Appeal*, 108 Pa. St. 615; *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281; *Jones on Liens*, par. 132. In our opinion the court had no jurisdiction to adjudicate upon the possessory or retaining lien of complainant.

The second ground of relief relied upon by the complainant in his bill, that the Attorney's Lien Act of

1909 creates a lien as against the client upon the note and trust deed described in the bill, cannot be maintained even though it be conceded that the complainant was the attorney of the defendant. While the Act of 1909 does not expressly or by implication repeal the common-law retaining lien, it does not in terms relate or apply to such a lien as is set forth in the bill of complaint and sought to be established or adjudicated thereby. The Lien Act of 1909 gives the attorneys at law a lien upon all claims, demands and causes of action, including all claims for unliquidated damages which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted for the amount of any fee which may have been agreed upon between the attorneys and their clients, or, in the absence of such an agreement, for a reasonable fee for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action; and the act provides for the service of notice in writing upon the party against whom the clients may have such suits, claims or causes of action. Giving the act a reasonable construction and having in mind the evident purpose sought to be accomplished by the legislature in passing the act, we are of the opinion that it was not intended to apply, and has no reference, to the establishment of attorneys' liens upon papers or securities belonging to their clients which come into their hands in the ordinary course of business. No remedy is given in equity by the act to establish or enforce a lien upon any documents or writings. A remedy by petition is provided under which any court of competent jurisdiction may adjudicate the rights of the parties, and enforce such lien as is contemplated in the act, and it has been held in *Sutton v. Chicago Rys. Co.*, 258 Ill. 551; that the attorney's lien provided for in the Act of 1909 may be enforced by petition in the client's cause wherein the employment was made, and

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that the act contemplates that the attorney shall have a lien from and after service of notice on the defendant which shall protect him in any settlement thereafter made with the client, whether the suit is pending or has been finally determined by judgment.

In construing the statute, the Supreme Court, in *Baker v. Baker*, 258 Ill. 418, held:

"While the act is entitled as one creating an attorney's lien and for enforcement of the same, and while it in terms gives the attorney a lien for his fees, the lien created partakes but little of the elements and nature of the ordinary lien. It attaches to any verdict, judgment, decree, or the proceeds of any settlement. In other words, it is a lien upon the proceeds, only, of the litigation or settlement of the claim."

We are of the opinion that a bill will not lie under this act to establish and enforce an attorney's lien upon the papers in the attorney's hands. The act does not purport to cover such a lien.

The bill should have been demurred to for want of equitable jurisdiction to establish and enforce an attorney's lien either under the Act of 1909, or a mere possessory or holding lien under the common law.

The decree is reversed and the cause remanded with directions to dismiss the bill for want of jurisdiction. All costs of this appeal should be taxed against appellant.

Reversed and remanded with directions.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1915.

**Harry Surface, Appellee, v. Chicago, Milwaukee & St.
Paul Railway Company and Chicago, Indiana &
Southern Railroad Company, Appellants.**

Gen. No. 5,865.

1. **RAILROADS, § 364***—*what provisions of lease of right of way are valid.* A provision of a lease of a portion of a right of way, stating that the lessee assumes the risk of damage by fire, is valid between the parties thereto and enforceable like any other provision in a contract.

2. **LANDLORD AND TENANT, § 404***—*when subtenant bound by provisions of lease.* While there is no privity of contract between a landlord and a subtenant, such subtenant is charged with notice of the terms of the lease, and is bound by its conditions.

3. **APPEAL AND ERROR, § 1491***—*when exclusion of evidence reversible error.* In an action against a railroad for the destruction of property by fire, where a lease restricting the railroad's liability was excluded when competent, and the court gave an erroneous reason for such exclusion operating to mislead the defendants and prevent them from making proof technically sufficient as a foundation for secondary evidence, the action of the court was reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. RAILROADS, § 364*—*what is effect of condition of lease releasing railroad from liability for fire.* A stipulation of a lease of a portion of a right of way stating that the railroad was not liable for damages by fire escaping from engines operated upon the lessor's railway cannot be construed as protecting merely the railroad and leaving its agents and servants liable.

5. ASSIGNMENTS, § 31*—*when action may be brought in name of assignor.* While section 18 of the Practice Act (J. & A. ¶ 8555) permits the prosecution by the owner of a non-negotiable chose in action in his own name, he is not precluded from bringing the action in the name of his assignor.

6. PAYMENT, § 24*—*how pleaded and proved.* Payment may be pleaded specially or proved under the general issue.

Appeal from the Circuit Court of Putnam county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed April 15, 1914. Rehearing granted and opinion filed January 6, 1915.

BARNES & MAGOON and BOYS, OSBORN & GRIGGS, for appellants; R. J. CARY, O. W. DYNES, C. S. JEFFERSON and WALLACE J. BLACK, of counsel.

BUTTERS & ARMSTRONG, GEORGE W. HUNT and BARGER & HICKS, for appellee; C. O. CARLSON, of counsel.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Appellee, Harry Surface, about May 12, 1910, purchased from the Illinois Granaries Company, a corporation, a grain elevator building with its machinery and some appurtenant buildings used in connection with handling grain, all located on the right of way of the Chicago, Indiana & Southern Railroad Company, one of the appellants; the bill of sale evidencing the transaction so stated the location of the property without stating by what right, if any, it was there situated. The property so purchased was destroyed by fire July 9, 1910, which fire is charged to have been communicated from a locomotive engine of the Chicago, Milwaukee & St. Paul Railway Company, the other appel-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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lant, while operated by it upon the railroad of the Chicago, Indiana & Southern Railroad Company, by virtue of some authority from that Company. This suit was brought against both Companies to recover for the loss so sustained, and a trial resulted in a verdict and judgment of forty-two hundred dollars against both defendants, from which judgment they prosecuted this appeal.

The Illinois Granaries Company was at the time of the sale occupying the ground on which the building sat under a lease from the Chicago, Indiana & Southern Railroad Company, describing by metes and bounds a tract about thirty by two hundred feet, for a term of five years beginning December 1, 1906, at a nominal rental of five dollars per annum. It was provided in the lease that the premises should be used exclusively for the purpose of receiving, storing, handling and shipping grain, coming to or shipped by the lessee over the railway of the lessor, and that the lessee "assume the risk of all loss and damage to the buildings, * * * their contents, and to property or material placed or stored by said lessee on or adjoining said premises, which may arise from fire escaping from engines operated upon the railway of lessor, * * * that the lessor shall in no event be or become liable for any loss or damage that may occur, or be caused, at any time to the property or employees of the lessee, or to any other person or persons who are not employed by the lessor or to their property, by reason of, or in the use of, the railway track now or hereafter laid upon or adjacent to the premises hereby leased, or by the men, engines, cars or other means or agencies employed or engaged in the use thereof in connection with any business of or for the lessee, whether said loss or damage be caused by the negligence of the lessor or its employees or otherwise."

That this provision of the lease, against liability for fire, is valid between the parties thereto, and en-

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forceable according to its terms like any other provision in a contract, is so well settled by the case of *Checkley v. Illinois Cent. R. Co.*, 257 Ill. 491, and the principles of law and the authorities there so fully discussed, that further citation of authority is unnecessary. In this and many other cases dealing with the subject is found the expression, in substance, that the railway company is under no obligation to permit the structure to be placed on its right of way, and, if it does permit it, it has the right to impose this restriction upon its liability for loss by fire.

A copy of the lease was offered in evidence by the defendants below, and on objection excluded by the Court. The controlling question here is whether the Court erred in so doing. It is contended by appellee that he is in no wise bound by the provisions of that lease; that while the stipulation that the railway company should not be liable for loss by fire may be binding as between the parties to the lease, that he as the purchaser of the property did not become a party to the lease and that there is no privity of contract between him and the railway company, and he cites authorities to the effect that there is no privity of contract between a sublessee and the original lessor, and that the sublessee is not bound by covenants in the original lease; and it is true that as to certain covenants in leases a sublessee is not bound because of no privity of contract; but while there is no privity of contract between the landlord and a subtenant, still subtenants are charged with notice of the terms of the lease, and are bound by its conditions. 24 Cyc. 986. This general principle, and that the sublessee acquires no greater right in the premises than that of the original lessee, is sustained in the authorities cited in Cyc. and often repeated in cases that may be found by reference to the volume of annotations supplementing Cyc. We said in *Large v. Wabash R. Co.*, 168 Ill. App. 310, where we had a similar question before us, that the

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purchaser knew the building was on defendant's right of way, and that it must be there by virtue of some arrangement express or implied; and he was bound to know, at his peril, by what right the building was there. Appellee insists that this decision is based on neither principle nor authority and that it should not be followed. It seems to us supported by the authorities above cited, and on principle much more reasonable than the position that the protection contracted for by the lessor should be entirely lost if the lessee should sublet or sell the building erected under the conditions prescribed in the lease. If the railway company had permitted the erection of the building on its right of way and attempted to protect itself from liability for fires that might be set from its engines by providing that the building should be constructed fire-proof, it would hardly occur to anyone to argue that a sublessee might construct a frame building because by reason of no privity of contract he was not bound by that provision of the lease, and we see little difference in principle between the case supposed and the one before us in that respect. There is no claim that appellants or either of them were responsible in any way for appellee's purchase of the property. Appellee testified that he knew it was on the railroad right of way, and, as we have seen, it was so recited in his bill of sale. We are of the opinion that he had no greater rights against appellants than had his grantor, the original lessee. He was seeking to recover of a railway company damages for an injury to his property found on its right of way. It seems material to know why the property damaged was there. If it was wrongfully there the duty of the company to not damage it is quite restricted; if it was rightfully there then the duty of the company is fixed and determined by the conditions imposed in permitting it to be and remain there. We are of the opinion that the lease in ques-

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tion was competent and very material evidence in the case.

The copy of the lease was offered in evidence by appellants and objected to by appellee on the grounds: That the Chicago, Milwaukee & St. Paul Railway Company is not a party to it or protected by its covenants; that the Chicago, Indiana & Southern Railroad Company by its conduct had made it incompetent as to it; that the evidence showed that the lease had been surrendered before the fire, "and furthermore there had been no proper foundation laid for its introduction as an instrument in evidence on behalf of either defendant." The Court took the question under advisement. There was considerable testimony offered on the question whether the original lease had been surrendered and cancelled before the fire and as to the present whereabouts of the paper itself, in which it appeared that there had been a former partial trial of the case in the same court; that the original lease had been used on that trial and was thought to have been left with the clerk of the court but could not now be found. There was also evidence tending to show that the original lease might then be in possession of the Chicago, Indiana & Southern Railroad Company, at its office in Cleveland, Ohio. Then the lease was reoffered and the objection renewed and the court still kept the matter under advisement until about the end of the trial, when the court announced to counsel that in his opinion the lease was not competent evidence on behalf of the defendant Chicago, Milwaukee & St. Paul Railway Company; that it was uncertain under the evidence whether it was cancelled before the fire but he thought he ought not to permit it to go to the jury and he would sustain the objection to its admission; whereupon appellants' counsel reoffered the copy of the lease on the part of each defendant, and plaintiff entered a general objection which the Court sustained, adding "that the Court does not sustain it upon the ground

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that the proper foundation has not been laid to introduce secondary evidence.”

Counsel for appellee strongly insist that the action of the Court is sustained on the ground that there was no sufficient evidence of the loss of the original lease, or that the copy offered was a true copy, to warrant the introduction of secondary evidence, and they say it is immaterial what reason the Court gave for his ruling if the decision was correct. This is true as a general principle, but in the instruction of testimony, where, as in this case, the burden of the argument is not that the evidence is secondary but that it is incompetent and irrelevant, we assume if a trial judge, on a motion for a new trial, found that he was mistaken in holding against the party offering the instrument on the main question and had advised him that he would not permit the introduction of the copy for the reason that the original was not competent and that he was not ruling against him because of his failure to lay a proper foundation for secondary proof, that he would grant a new trial on that ground, and that the Court in this case would not have everruled the motion for a new trial had he been of the opinion that he was in error in the reasons he gave for sustaining the objection to this evidence. Being of the opinion that the Court was in error in his view of the case as shown by the record in his statement to counsel, and that appellants may have been misled by such statements and for that reason failed to make proof technically sufficient as a foundation for secondary evidence, we are inclined to hold it reversible error.

There was evidence tending to show that the lease had been surrendered and other evidence tending to show that it had not. On another trial the facts connected with that transaction will no doubt more fully appear, but on this record the most that can be said for appellee on that question is that the evidence left it in doubt and therefore the Court was not warranted

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in assuming the fact in ruling on the introduction of evidence. We are of the opinion that the stipulation as to damages by fire "which may arise from fire escaping from engines operated upon the railway of lessor," and against "loss or damage that may occur * * * by reason of, or in the use of the railway track," etc., is available as a defense to the Chicago, Milwaukee & St. Paul Railway Company. It is literally within those provisions, and as said by appellee in his brief to have been operating by virtue of some authority, license, consent or permission of the Chicago, Indiana & Southern Railroad Company. It may be more clearly shown on another trial why the St. Paul Company was there operating its engine. The Court instructed the jury at the instance of appellee that if the Chicago, Milwaukee & St. Paul Railway Company was found guilty of negligence causing the fire, then they should find both defendants guilty, and refused to instruct the jury on the request of appellants that if the fire was set by an engine of the Chicago, Indiana & Southern Railroad Company then they should find both of the defendants not guilty. If the Chicago, Indiana & Southern Railroad Company permitted the engine of the other defendant upon its tracks under circumstances and conditions that made it responsible for its acts, it would seem that the stipulations in the lease should apply to both companies. It seems to us that the stipulations cannot be construed as protecting merely the corporation from liability for negligence and leaving its agents and servants liable.

No error being assigned on the giving or refusing of instructions, we therefore do not pass on them. There is some argument as to the action of the Court in sustaining demurrers to pleas, and there is confusion in the argument, and perhaps in the record, as to just what was done in that regard. We may say, for the purpose of another trial, that if it be a fact that the claim of appellee was assigned by him to an insurance

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company before this suit was brought, we do not regard that as a defense to the prosecution of this action in the name of appellee. While section 18 of our Practice Act (J. & A. ¶ 8555) permits the prosecution by the owner of a non-negotiable chose in action in his own name, we do not understand that he is precluded from bringing the action in the name of the assignor under the practice established before the enactment of that statute. Appellants in their arguments claim to have filed pleas to the effect that the claim had been settled and discharged before suit was brought and that the Court refused to sustain such pleas. The general rule is that payment may be pleaded specially, or proved under the general issue; but on another trial the defendants should be permitted, if they deem it necessary, to file such further pleas as in their judgment are required to present their defense.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Finley Barrell, Appellee, v. Lake Forest Water Company.

Gen. No. 5,982. (Not to be reported in full.)

Interlocutory appeal from the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding. Heard in this court. Reversed and remanded. Opinion filed January 6, 1915.

Statement of the Case.

Suit by Finley Barrell against Lake Forest Water Company, a public service corporation to restrain it from shutting off the water from the complainant's premises because of his failure to pay a bill for water alleged to be greatly in excess of what he used. The

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bill alleged an offer to pay a reasonable amount, and prayed for an accounting. An injunction was granted without notice on the bill, and defendant appealed from an interlocutory order overruling a motion to dissolve the injunction.

COOKE, POPE & POPE, for appellant.

FREDERICK SASS, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. **WATERS AND WATER COURSES**,—*when consumer may enjoin enforcement of unreasonable charge.* A consumer of water furnished by a public utilities company may restrain the enforcement of an unreasonable charge.

2. **WATERS AND WATER COURSES**,—*how water company may collect charges.* A public service corporation may shut off water for nonpayment of a bill if there is no overcharge, and a motion to dissolve an injunction preventing such shutting off should not be overruled when it appears that there was no overcharge.

3. **INJUNCTION**, § 273*—*how hearing to dissolve may be had.* Under sections 14 *et seq.*, of the Injunction Act (J. & A. ¶¶ 6174 *et seq.*) a motion to dissolve an injunction should be heard and determined upon the weight of the testimony introduced by the respective parties at the hearing.

4. **WATERS AND WATER COURSES**,—*when injunction preventing collection of water charges should be dissolved.* An order overruling a motion to dissolve an injunction preventing a public service corporation from collecting a bill for water served, *held* erroneous when supported only by the general statement of the consumer that he was charged for more water than he consumed, and more than he was charged for in former years.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Eugene Norton, Coroner, Defendant in Error, v. Herman Deuchler and T. J. Turney, Plaintiffs in Error.

Gen. No. 5,987. (Not to be reported in full.)

Error to the City Court of Aurora; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

Statement of the Case.

Action by Eugene Norton, coroner of Kane County for use of C. T. McBriarty, sheriff of Kane county, against Herman Deuchler and T. J. Turney on a bond given in a replevin suit.

In a replevin suit brought by defendant Deuchler for certain property on which he held a chattel mortgage securing a note for \$600, he and the defendant Turney gave the bond in question. The defendants defended under the Replevin Act, sec. 26 (J. & A. ¶ 9211), and to prove title introduced a certified copy of the chattel mortgage. Plaintiff had verdict and judgment for \$1,200 debt and \$272.50 damages.

To reverse this judgment, defendant prosecutes this writ of error.

FRED B. SHEARER, for plaintiffs in error; RAYMOND & NEWHALL, of counsel.

CHARLES H. DARLING, for defendant in error.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. REPLEVIN, § 106*—*when burden of proof on defendant in action on bond.* In an action on a replevin bond given in a suit which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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was dismissed by the plaintiff in replevin, the burden is on the defendant to show property in himself in mitigation of damages.

2. REPLEVIN, § 124*—*when evidence offered insufficient to establish title in action on bond.* Defendant in an action on a replevin bond, given in a replevin suit which he had voluntarily dismissed, sought to establish his title to the property by introducing a certified copy of a chattel mortgage which described a note secured thereby, giving its date, amount and stated that it was payable to defendant and that it was signed by the mortgagor, and gave the date of its maturity. There was no offer to show an indebtedness from the mortgagor to defendant nor any other offer to show the contents of the note than that contained in the copy of the mortgage. The only excuse for failure to produce the note was defendant's evidence that he was unable to find it, though he had made a careful search for it. It was *held* that even though the proof of loss of the mortgage was sufficient under the Mortgage Act, sec. 5 (J. & A. ¶ 7580), it was not sufficient as a ground for secondary evidence of the contents of the note and there was no sufficient offer to prove their contents, and that the evidence offered was not sufficient to show title in defendant.

S. A. Wright and E. P. Fleming, partners as Wright & Fleming, Appellees, v. Elsie Olson, Appellant.

Gen. No. 5,996. (Not to be reported in full.)

Appeal from the Circuit Court of Lee county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

Statement of the Case.

Action by S. A. Wright and E. P. Fleming, partners as Wright & Fleming, against Elsie Olson to recover commissions on the sale of real estate.

Plaintiffs claimed that the defendant agreed to pay a commission of one dollar per acre if they would sell her farm of one hundred and sixty acres at two

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

hundred dollars an acre. Defendant denied that she had authorized them. The evidence showed that one of the plaintiffs spent much time in an effort to sell the farm, that he procured the purchaser who purchased at the agreed price.

There was a verdict and judgment for plaintiffs in the justice court for the full amount claimed, and from the judgment defendant appealed to the Circuit Court and, on affirmance by that court, takes this appeal.

JOHN E. ERWIN, for appellant.

HARRY EDWARDS and C. F. PRESTON, for appellees.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 93***—*when finding of jury on conflicting evidence not disturbed.* In an action to recover commissions on the sale of land, where the evidence is directly conflicting as to whether or not plaintiff was authorized to make the sale, defendant also claiming that she supposed that he was acting as the purchaser's agent, but the evidence showing that he was not acting for the purchaser, the finding of the jury will not be disturbed.

2. **BROKERS, § 85***—*when testimony as to listing of land for sale admissible in action for commissions.* In an action by a real estate broker to recover commissions on a sale of land alleged to have been made by agreement with the owner, evidence of plaintiff that he had listed the land on his books is admissible.

3. **APPEAL AND ERROR, § 1533***—*when use of ordinary term in instruction not error.* In an action to recover commissions on a sale of real estate claimed to have been made by plaintiff for defendant, it is not error, in an instruction to use the word "listed" in the same sense that it had been frequently used in the testimony and as it is understood in ordinary conversation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Strawn v. Vipond, 191 Ill. App. 274.

Louis F. Strawn, Appellee, v. Nicholas Vipond, Appellant.

Gen. No. 6,003. (Not to be reported in full.)

Appeal from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

Statement of the Case.

Bill in equity by Louis F. Strawn against Nicholas Vipond to annul a judgment by confession on a promissory note given by complainant to defendant and to restrain the collection of the note on the ground that the only consideration therefor was losses at gambling at defendant's saloon and gambling house.

The cause was referred to a master in chancery to take evidence and report his conclusions.

The master found the allegations of the bill true and recommended a decree for complainant.

Objections and exceptions were filed and overruled by the master and the chancellor, and a decree for complainant was entered in accordance with the master's findings and recommendations.

From the decree, defendant prosecutes this appeal.

A. W. ALLEN and McDougall & Chapman, for appellant.

LOUIS F. STRAWN, *pro se*.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

EQUITY, § 425*—*when master's findings not disturbed on appeal.*
In a suit to annul a judgment by confession on a promissory note

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dime Savings & Trust Co. v. Jacobson, 191 Ill. App. 275.

and to restrain the collection of the note, on the ground that the consideration for the note was losses of the maker at gambling at defendant's gambling house, where evidence was conflicting and the master to whom the cause was referred found for the complainant, after hearing the witnesses, his conclusion that the weight of the testimony was in favor of complainant will not be disturbed, in the absence of a showing that he erred therein.

Dime Savings & Trust Company, Administrator, Appellee, v. Abraham Jacobson, Appellant.

Gen. No. 5,888. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed April 15, 1914. Rehearing granted and opinion filed January 6, 1915.

Statement of the Case.

Action by Dime Savings & Trust Company, administrator *de bonis non* of the estate of Harry Olin, deceased, against Abraham Jacobson, on the latter's note for \$500, payable to Olin, and on his check No. 7592 for \$525, also payable to Olin.

Plaintiff introduced said instruments in evidence and proved that it had received them from the former administrator and also that the check had been presented for payment to the bank on which drawn and payment refused for want of sufficient funds.

The defense was payment, which as to the note was testified to by defendant's sister and stenographer, who was present at a conversation between defendant and deceased, and as to the check, by a witness who was present at a conversation between defendant and deceased.

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The jury rendered a verdict for plaintiff for \$1,176. Defendant's motion for a new trial was denied, and plaintiff had judgment.

From the judgment, defendant appeals.

J. A. CAMERON and J. A. WEIL, for appellant.

KIRK & SHURTLEFF, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 94*—*when survivor not competent in action by administrator.* In an action by an administrator to recover on a check and note given by defendant to plaintiff's decedent, the defendant is not competent to testify as to the defense of payment.

2. PAYMENT, § 29*—*when evidence sufficient to show payment.* In an action by an administrator to recover on a check and note given by defendant to plaintiff's decedent, where defendant pleads payment as a defense and introduces two witnesses, one of whom testified that plaintiff's decedent acknowledged in conversations with defendant in her presence that defendant had paid him the note but that he could not find it and would return it as soon as he could, the other testifying to a similar conversation as to the payment of the check, and also introduces three checks drawn by defendant to plaintiff's decedent or order, one of which had written on it "balance in full payment" of the note in question, and the two of which were marked, respectively, "% check #7592" and "in full of check #7592," there being no evidence that these words were not placed on the checks, before they were delivered, but one witness testifying that the statement on one check was placed on it before delivery. The date and number of check mentioned were the same as those of the check in suit. No evidence was introduced by plaintiff to overcome this evidence. It was *held* that the payment was established by a preponderance of the evidence.

3. INSTRUCTIONS, § 18*—*when improper as to meaning of language.* An instruction which submits to the jury the meaning of language which is plain and can have but one meaning is erroneous as intimating that the court is of opinion that the jury may rightfully place upon the language some other construction.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois for use of County of La Salle, Appellant, v. John L. Witzeman et al., Appellees.

Gen. Nos. 5,924, 5,925.

1. **COURTS, § 141***—*when statutes and decisions not binding on.* Constitutional and statutory provisions regulating the salaries of clerks of courts of record for the performance of duties imposed upon them by the laws of the State and the construction placed by the courts upon such provisions are not necessarily decisive of the rights of such clerks to fees for performance of duties imposed upon them by the Federal Naturalization Act.

2. **ALIENS, § 13***—*when Federal regulation of naturalization exclusive.* U. S. Const. art. I, § 8, clause 4, gives Congress the power to establish uniform rules of naturalization, and this jurisdiction, when exercised, is exclusive and repeals former laws by which the states naturalized citizens and fixed the fees and their application.

3. **UNITED STATES, § 1***—*when enforcement of Federal act not obligatory upon State court.* Congress possesses no power to compel a State court to enforce the Federal Naturalization Act.

4. **UNITED STATES, § 1***—*when naturalization expenses not obligatory upon State or county.* The State is not bound to pay for the clerical services required in the naturalization of aliens in State courts under the Federal Naturalization Act, nor is the county board bound to make the clerk any allowance for a clerical force or other expenses incidental to such proceedings.

5. **ALIENS, § 13***—*how expenses to be met.* It is the purpose of the Federal Naturalization Act that the expenses of clerical assistance necessary to carry out the requirements of the act should, in the State courts, be met by the fees fixed by the act and not borne by the State.

6. **CLERKS OF COURT, § 14***—*when entitled to fees fixed by Federal act for naturalization services.* The county has no claim to fees collected by its Circuit Court clerk for performing services and fixed in accordance with the Federal Naturalization Act, especially where the county has not provided or paid for any clerical assistance.

Appeal from the Circuit Court of La Salle county; the Hon. S. C. STOUGH, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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W. E. REDMON and W. I. HIBBS, for appellant.

DUNCAN & O'CONOR, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

The county of LaSalle brought two actions of debt upon the official bonds of John L. Witzeman, its circuit clerk, one upon the bond given for the official term beginning on the first Monday of December, A. D. 1904, and the other upon the official bond given for the term beginning the first Monday of December, A. D. 1908. The sureties on each bond were the same, so that all the parties to each case were the same. In each case a proper declaration was filed, alleging three breaches of the bond. The first and third breaches assigned bore no relation to the subject-matter of this opinion. They were afterwards dismissed. The second breach in each declaration charged that said circuit clerk had received, during the term of office covered by that bond, fees for the naturalization of aliens, and had not reported the receipt of said fees to the chairman of the county board, and had not paid said fees to the county treasurer, but had converted said moneys to his own use. Demurrers were filed and sustained to each of said second breaches. As the first bond took effect as of the first Monday of December, 1904, and the present Naturalization Act was not approved until June 29, 1906, and did not go into force until ninety days from its passage, there might have been naturalization fees received by this clerk under former and very different naturalization laws, under which the State fixed and controlled the fees for naturalization, and if such fees had not been duly accounted for, there might be a liability under this bond therefor; but counsel for both parties, in argument, have assumed that the only matter here litigated is the naturalization fees received by the clerk under said Federal Statute of 1906, and

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therefore we will confine our discussion to the meaning and effect of that act. After said demurrers were sustained there was a judgment for costs in each case, and an appeal therefrom to this court. We dismissed those appeals in *People v. Witzman*, 186 Ill. App. 216, because there were no final judgments in the record. Thereafter, final judgments were entered in the court below, and these appeals are prosecuted to this court. As the cases are the same except as to the period covered by the bond sued on, one opinion will dispose of both cases.

The Federal Act of June 29, 1906, establishes a complete code for the naturalization of aliens, and practically annuls substantially all previous statutes upon that subject. It confers exclusive jurisdiction to naturalize aliens as citizens of the United States upon certain Federal courts, and upon all courts of record in any State or territory having a seal, a clerk and jurisdiction at law or equity in which the amount in controversy is unlimited, which in this State includes the Circuit Courts. Section 13 of said Act requires the clerk of each court exercising jurisdiction in naturalization cases to charge, collect and account for the fees therein specified. The fee for receiving and filing a declaration of intention to become a citizen, and issuing a duplicate thereof, is fixed at \$1. The fee for making and filing and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon is fixed at \$2, and the fee for entering the final order and the issuance of a certificate of citizenship thereunder is fixed at \$2. The clerk is therein authorized to retain one-half of the fees collected by him in such naturalization proceedings, and to account for the remaining one-half in his quarterly accounts required to be rendered to a certain department of the Federal government, and he is required to pay over to that department, within thirty days after the close of each quarter of each year, the one-half of

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the fees so received, and that sum is required to be deposited in the treasury of the United States. The petitioner for naturalization is also required to pay to the clerk a sum sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom the petitioner may request a subpoena, and when the proceeding for naturalization is ended the clerk is required to pay the witness' fees from such sum, and return the residue, if any, to the petitioner. It is also provided that when the one-half which the clerk is permitted to retain shall reach the sum of \$3,000 in any one fiscal year, all fees received by such clerk in naturalization proceedings in excess of such amount in said year shall be paid over to a department of the Federal government. That section also provides that the clerk of a court exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by that act upon such clerk from fees received by him in naturalization proceedings, and that if such clerk in any one year collects fees in excess of \$6,000,—that is, if the one-half retained by the clerk exceeds \$3,000,—then the secretary of Commerce and Labor may allow such clerk, from the money which the United States shall receive, additional compensation for the employment of additional clerical assistance, if, in the opinion of such secretary, the business of said clerk warrants such allowance.

Section 9 of article X of the Constitution of 1870 of the State of Illinois provides that the clerks of all courts of record shall receive, as their only compensation for their services, salaries, to be fixed by law, and paid only out of the fees of the office actually collected, and that all fees, perquisites and emoluments above the amount of said salaries shall be paid into the county treasury, and that the number of the deputies and assistants of such officers shall be determined by rule of the Circuit Court, to be entered of record, and

their compensation shall be determined by the county board. Section 10 of said article requires the county board to fix the compensation of all county officers, and the amount of their necessary clerk hire, and their expenses, and where fees are provided for said compensation shall be paid only out of them, and shall in no instance exceed the fees actually collected, and that all fees or allowances by said clerks received in excess of their said compensation shall be paid into the county treasury. Section 51 of chapter 53 of the Revised Statutes is intended to carry into effect these constitutional provisions and requires each county officer to keep an account of all his fees and emoluments earned, and all payments received, and to account therefor, and to report the same twice each year to the chairman of the county board, and to pay over to the county treasurer the balance in his hands after deducting his salary and such expenses as the county board may allow. There are numerous cases in this State strictly enforcing the foregoing constitutional and statutory provisions, and holding that even the imposing of new duties upon such an officer after he has entered upon his office will not permit him to receive, or the Legislature to confer upon him, any additional compensation therefor. These provisions and decisions, however, were enacted and announced with reference to duties imposed upon him by the laws of the State, and we do not consider them as necessarily decisive of the question here involved.

The fourth clause of section 8 of article I of the Constitution of the United States gave to Congress the power to establish uniform rules of naturalization. Undoubtedly that jurisdiction, when exercised, is exclusive, and operates to repeal former laws by which the States naturalized citizens of the United States, and fixed the fees therefor, and controlled the application of said fees; and numerous decisions which were made under those former laws are no longer authority.

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When Congress confers jurisdiction upon a Federal court, such act binds the Federal court, and it is compelled to perform the duty so imposed upon it. Congress possesses no power to compel a State court to entertain proceedings for the enforcement of Federal statutes such as this. It has been said that such an act as this confers upon the State court permissive jurisdiction; that is, the State court is permitted to act, but cannot be coerced into doing so. *Robertson v. Baldwin*, 165 U. S. 275; *State v. Judges of Common Pleas Hudson Co.* (N. J.) 30 L. R. A. 761 and notes. It was said in *Commonwealth of Kentucky v. Dennison*, 24 How. (U. S.) 66, page 108, that Congress may authorize a particular State officer to perform a particular duty, but if he declines to do so it does not follow that he may be coerced. The court there referred to laws which have been passed authorizing State courts to entertain jurisdiction in certain proceedings by the United States, and said that these powers were for some years exercised by State tribunals readily, and without objection, until, in some States, it was declined because it interfered with and retarded the performance of duties which properly belonged to them as State courts. The Court there said that in these cases the co-operation of the States was a matter of comity, which the several sovereignties extended to one another for their mutual benefit, but was not regarded as an obligation imposed by the Constitution, and that the Acts of Congress conferring jurisdiction merely gave the power to the State tribunals and left it to the States to exercise such power or not, as might best comport with their own sense of justice and their own interest and convenience. In the matter of admitting aliens to become citizens of the United States, there are Federal courts in each State entirely competent to do all of that work, but there are only a few such courts in each State, and many aliens are located far distant from the place where such courts are held, and it would

be a great burden to compel them to attend with their witnesses at the place where such courts are held, and it is therefore a matter of great convenience to them to have this jurisdiction conferred upon the State courts. The jurisdiction so conferred upon State courts, however, is not compulsory. No doubt the Legislature of any State might forbid its courts to devote any time to this work. Probably any particular court of the State might lawfully refuse to turn aside from its other business to naturalize aliens. Indeed we are advised that certain courts in this State refuse to take jurisdiction in naturalization proceedings under the Federal statute. Undoubtedly the clerk of the court would not be permitted to decline to perform this work so long as he is not forbidden by the Legislature or by the court of which he is the clerk. We regard it as entirely clear that the State is not bound to pay for the clerical services required in the naturalization of aliens in the State courts, nor is the county board bound to make the clerk any allowance for a clerical force or other expenses for such service.

It may be instructive to ascertain from said Naturalization Act what duties are required of the clerk of the court in naturalization proceedings. The government of the United States furnishes to each such clerk blank forms and all records and documents required in the naturalization of aliens. The alien must file, at least two years prior to his application for admission, a declaration of his intention to become a citizen. The law does not say that the clerk shall do the clerical work of filling up the blank form of such declaration, which has been furnished him by the United States, but it is a matter of common knowledge that he must do so in substantially all cases, because the alien seldom has the ability to fill up such a declaration correctly and completely, and the construction put upon the language of such a declaration by the officers controlling the naturalization department of the government is such that

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extreme care and accuracy is required, or the applicant to be naturalized must finally fail. The clerk who fills up this form must ascertain and set forth the name and age and occupation of the applicant, and must insert in such declaration his personal description. Each of the forms prepared and furnished by the department for use in naturalization proceedings requires the insertion of the color, complexion, height in feet and inches, weight, color of the hair, color of the eyes, and other visible distinctive marks of the applicant. There must also be inserted in said petition the place of birth of the applicant, and the form prescribed requires the date of his birth. There must also be inserted in said petition the date of the arrival of the applicant in the United States, the name of the vessel in which he came, and the forms prescribed require the clerk to ascertain and insert the character of the conveyance or the name of the transportation company by which the applicant arrived, if he did not come upon a vessel; and it must state also his last foreign residence and his present place of residence in the United States. There must be prepared a duplicate of said declaration of intention. When the time has arrived at which the applicant can apply to become a citizen a petition therefor must be filed. This the clerk, from the necessities of the case, must prepare, upon the forms furnished him, and must ascertain from the applicant his full name, his place of residence, with street and number, his occupation, the date and place of his birth, the place from which he emigrated, the place of his arrival in the United States, the name of the vessel on which he arrived; and the forms furnished require that, if he did not arrive by vessel, then the character of the conveyance by which he arrived or the name of the transportation company shall be given, and also the time when and place where and the name of the court where he declared his intention to become a citizen. The clerk must ascertain if the applicant is married,

and if so, must insert his wife's name, and where she was born. There must be inserted the number of his children, and the name of each child, and the date and place of its birth, and the place of residence of each. The petition must be made to state the time when he arrived in the State where the application is heard, and where he resided prior to that time, if in the United States, and if he has previously petitioned for citizenship which has been denied, the petition must state the name of the court in which said application was made, and the date when and the reason why the same was denied. To this petition must be annexed an affidavit of the petitioner and of two witnesses; and the name and occupation and place of residence of each witness must be given, and the length of time which each witness has known the petitioner, and other details. Certain particular days of the court must be set aside by order of court as naturalization days, and the petition must be set down for hearing by the clerk for a particular naturalization day, and upon the filing of the petition the clerk must post in a public and conspicuous place in his office, or in that building, a notice giving the name, nativity and residence of the alien, the date and place of his arrival in the United States, the date fixed for the final hearing of his petition and the names of the witnesses, and if requested, the clerk must issue a subpoena for said witnesses. He must attend the hearing on naturalization day, and swear the witnesses, and administer the oath of allegiance to the petitioner who is admitted, and must then issue to him a certificate of naturalization, in which the clerk must give the new citizen's age, his height in feet and inches, his color, his complexion, the color of his eyes, the color of his hair, and his visible distinguishing marks, the name, age and place of residence of his wife and of each of his minor children, and must fill in the name of the citizen and his residence, and the term of the court and the day of the term at which he was admitted, and

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a copy of the order admitting him. The clerk must also fill out a stub of said certificate, containing these details, and the number of the certificate and the number of the stub must correspond. On the first working day of each month the clerk must send to the department at Washington duplicates of all declarations of intention, petitions for naturalization and certificates of naturalization filed or issued during the preceding month, and must send therewith a report showing the number of such papers filed or issued during the preceding month, and in the case of petitions for naturalization he must report to the department the approximate days of the final hearings. He also is required, within thirty days after each final hearing, to report to the department the name of each alien who is denied naturalization. He is also subject to the direction of said department, and must send to the department certified copies of such other proceedings and hearings instituted in or issued out of his said court as affect or relate to the naturalization of aliens, and as may be required from time to time by the department. Numerous rules and regulations are adopted by the department controlling the naturalization of aliens, and these are changed from time to time, and they must be studied and obeyed by the clerk. The government not only requires great particularity in the declaration of intention, but also in the petition for naturalization, and these details must be carefully ascertained and correctly inscribed in the petition, or great danger arises that the application may be denied because of the incorrectness or incompleteness of the statements therein made. In counties composed of rural communities, where residences are rarely changed and immigrants seldom locate, the work imposed upon the clerk of such court by naturalization proceedings during any one year will be slight. Where there is a large foreign population and many manufactories and industrial works inviting foreign

labor, the duties of such a clerk in naturalization proceedings may be very great.

It is obvious that Congress had no power to impose the burden of this clerical work upon the State, nor upon the county where the naturalization is had. It seems to us equally clear that Congress had no such intention. This seems plain from the general scope and structure of the Naturalization Act; and also from the following language in section 13 thereof: "The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts, from fees received by such clerk in naturalization proceedings." These are specific directions by Congress to the clerks to expend these fees in paying all additional clerical force required to perform the duties imposed upon the clerk by this Naturalization Act. How can the State or the county be heard to require the clerk to disobey these directions by Congress in a matter over which Congress has exclusive control, and instead to pay the fees to the county, and to accept such clerical assistance in naturalization matters as the State or county authorities may choose to allow? Congress says the additional clerical force required for naturalization shall be paid by the clerk from these fees. Can the State command that the clerk pay these fees into the county treasury, and depend upon the county board to determine what sum, if any, is needed for additional clerical aid? The supremacy of Congress over the entire subject of naturalization seems to imperatively require a negative answer. It seems to us, after a fair consideration of all the language of the act, that the conclusion is justified that the sums which the clerk is thereby allowed to retain were intended not merely nor not chiefly to pay the clerk himself for his additional labor, but to enable him to procure all the necessary clerical assistance to do the work which the

act imposed upon him. Of course, when the court and the clerk are acting under this law, they are governed by this law and not by the State statutes. The act requires that one-half the fees shall be remitted by the clerk to the United States government, and by no possibility can the county have any right to require the clerk to pay that money to it, although it is made up of fees paid to the clerk by virtue of his office. If the total received by the clerk in any one year for naturalization exceeds \$6,000, then the act requires him to remit all beyond that to the United States government. The act provides that if the clerk has so received more than \$6,000 in any one year, and has remitted \$3,000 to the United States government, and also the sum in excess of \$6,000, the department may allow such clerk, from the money which the United States shall receive, additional compensation for the employment of additional clerical assistance, if, in the opinion of said department, the naturalization business of such clerk warrants such further additional assistance; but that in no event shall the whole amount allowed a clerk of a court and his assistants exceed one-half the gross receipts of the office of such clerk from naturalization fees during said fiscal year. There is a further provision that if the business of the clerk for any fiscal year indicates, in the opinion of the department, that the naturalization fees for the succeeding year will exceed \$6,000, the department may authorize the continuance of the allowance for additional clerical assistance, until such time as the remittances indicate to the department that the fees of the then current fiscal year will not be sufficient to allow such additional clerical assistance, and that the payments for such additional clerical assistance shall be in the manner and under such regulations as the department may prescribe. If, when the Act of 1906 went into effect, the duties of this circuit clerk imposed upon him by the laws of this State had been such that his own services and

those of the clerical force which had been allowed to him by the laws of the State were just sufficient to accomplish the work of the office required by the State, and he had applied to the county board for an allowance for additional assistance to perform the naturalization work, the county board would have been under no compulsion to allow it. It might very reasonably say to him that he had an allowance out of the naturalization fees, which was intended to pay for all such help as the naturalization work might require. Suppose the county board refused to make him any additional allowance; would he still be required to pay one-half of the fees to the county board? Suppose that in that contingency, or even without having consulted the county board at all, he hired an additional clerk to perform the naturalization work, and agreed to pay him his one-half of all the fees paid in from naturalization sources, and he did so pay the money to the additional clerk so hired, could the county board still require him to pay that money into the county treasury? Would his official bond still be liable therefor? Suppose the clerk receives for his one-half over \$3,000, and pays the surplus to the United States government, and thereafter applies to the department for additional clerical assistance, and is authorized by the department to pay from said fees a certain sum for additional clerical assistance, and that sum is returned to him by the United States government or is paid by him out of the fees in his hands, must he be compelled to pay to the county treasurer the money which the United States has so furnished expressly for additional clerical assistance? It seems to this court that the answers to these questions must be in the negative. The declaration now before us does not charge that this county board made any allowance to this clerk for clerical assistance to do the naturalization work, or that the clerical assistance which had been furnished him by the county board was sufficient to

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enable him, with that force, not only to perform the duties devolving upon him under the State law but also to do the naturalization work. This declaration is to be construed most strongly against the pleader, and we think we may fairly assume that the county board had made him no allowance for clerical assistance to do this work, especially as it is clear that no duty rested upon the county board to make any such allowance. We draw the conclusion, from this Naturalization Act, that Congress intended that the State should not bear the burden of the clerical assistance necessary to do this work, but that it intended that the clerk should use these fees for that purpose.

This question has been before the courts of several other States, and in most of those States provisions similar to our own exist, requiring the clerk to perform his official duties for a fixed salary, and to turn his fees into some local treasury. The question first arose in *Eldredge v. Salt Lake County*, 37 Utah 188. It was there held that the State courts in acting in naturalization cases under this act are merely agencies of the national government; that the powers conferred and the duties imposed by said act upon State courts and the clerks thereof are not such as adhere to the office, and are not *ex officio* powers and duties belonging to and devolving upon the office as such, and that the duties which the clerk of the State court shall render in naturalization proceedings are not duties which are imposed on him nor services which are rendered by him as a part of the county office, to which he was elected, and of which he is an incumbent, and that the salary which he received as compensation for discharging the duties of his county office was not intended to and did not constitute compensation for the extra official services he rendered as an agent of the general government in discharging the powers conferred upon him by the Act of Congress, for which services the fees in question were allowed him by the

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national and not by the State government. In *Inhabitants of Hampden County v. Morris*, 207 Mass. 167, the same question was presented to the Supreme Court of Massachusetts, where there was a statute passed after this Naturalization Act went into force, requiring that all fees received by the clerk in naturalization cases, except sums expended for additional clerical assistance, should be paid to the county treasurer. It was held that that statute conflicted with the Federal statute, and must yield to the latter. It was there held that if the courts or Legislature of the State elected to exercise the jurisdiction conferred by the Federal statute, they must exercise it upon the terms and with the limitations stated in that statute, and if they chose to exercise jurisdiction in naturalization cases, they might not depart from the statute in any particular upon which it is within the constitutional power of Congress to legislate; that the amount of the fees to be charged and the disposition of the fees are proper subjects for congressional legislation; that is, that Congress might properly require a part of those fees to be paid into the treasury of the United States to aid in the payment of the expenses of maintaining the naturalization department, and that the State cannot take those fees away from the United States. It was there further said: "Congress well might think that the elaborate proceedings required by the statute impose such duties upon clerks of the courts that the interests of the public will be promoted by giving them special compensation to be taken from the fees. As this is the policy of the law under which the court is acting, the Legislature cannot nullify the statute by enacting that the clerk shall pay all the money to the county treasurer." It was there held that it was beyond the power of the Legislature to deal with the fees received under the law of the United States. This question was next before the Supreme Court of New York, and is reported in *In re Beyer*, 72

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Misc. 443. That court followed the decision of the Supreme Court of Massachusetts, but said but for that decision it would have been inclined to hold that the Federal statute was simply designated to reimburse the office for the clerical force required, rather than to provide for the personal and independent emolument of the incumbent of the office. In *Fields v. Multnomah County*, 64 Ore. 117, the clerk of such a court sought to compel the county commissioners to pay his statutory salary, which they refused to do because he had collected certain fees under this naturalization law, and had appropriated them to his own use, and had refused to account to the county therefor. That court held that the compensation provided for such clerk by the laws of the State was for the performance of the duties devolving on him under those laws; that if the State courts exercised the jurisdiction conferred by this Federal statute, the duties of the clerk in those matters were in addition to those imposed by the State; that in naturalization proceedings the clerk acts as the agent of the United States, and that the State cannot direct what the compensation of an agent of the general government, acting under a law of Congress, shall be; and that the clerk was entitled to receive and retain those fees, and was not required to pay them to the county. In *State v. Quill*, 53 Ind. App. 495, this question was before the Appellate Court of Indiana. There a Statute of 1895 fixed the fees for naturalization, and required them to be turned over to the county. It was held that these provisions were repealed by the Naturalization Act of Congress of 1906, and that since the enactment of the latter act it constitutes the only law on the subject of fees in naturalization cases. It was held that Congress might properly regulate not only the amount of the fees but also the disposition of them; that the State court, when it assumes jurisdiction in naturalization cases, must exercise it in conformity with the Federal statute, and derives no au-

thority from any other source. It is there said: "It becomes a Federal court for the purpose of naturalizing aliens, or at least an agency of the Federal government, and the officers of the court are necessarily the officers of the Federal government in that behalf." It was held that the county could not recover from the clerk the one-half the fees collected by him in naturalization proceedings. On the other hand in *Barron County v. Beckwith*, 142 Wis. 519, it was held that the services performed by clerks of the Circuit Court in proceedings to naturalize aliens under this statute are performed in their official capacities as such clerks, and they are not permitted to hold such fees, as against the counties, where they are on a salary basis, although the court there conceded that it found the question by no means easy of solution. In *City and County of San Francisco v. Mulcrevy*, 15 Cal. App. 11, it was held that the disposition of the fees received by the county clerk as *ex officio* clerk of the Superior Court, which had jurisdiction of naturalization proceedings under the Federal statute, did not concern the United States government, but was a matter solely between the clerk and the city and county of San Francisco, and that it was the official duty of that clerk under the charter of said city and county to pay such fees into the treasury of the city and county within twenty-four hours after they were received by him. In that case, the court sets out as important the salary of the county clerk fixed by the charter, and also the sums allowed him for the various clerical assistance he required. It is stated there that the total salary list so fixed and allowed for his office amounted to \$58,600 per annum, but a computation of the amounts fixed by the charter for the salaries of his forty-nine assistants, as stated in the opinion, shows that he was allowed for clerical assistance \$71,400 per year, besides his own salary, and the court there said that it concluded that that clerical allowance by the charter was intended to

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cover all the services that might be required of that clerk, and to pay all the deputies and employees that might be necessary in performing such services. There was also a provision of the law governing such clerk, that if he needed additional deputies, clerks and employees he should apply to the mayor therefor, and, if the mayor found the same necessary, he could take steps to authorize such appointments and provide for additional compensation. This case had been first appealed to the Supreme Court of California, and had been by that court sent to said Appellate Court under a provision of the State Constitution, and after the decision of the Appellate Court an application was made to the Supreme Court to hear the cause, and that application was denied. Thereafter, the case was removed to the Supreme Court of the United States, where it is reported as *Mulcrevy v. City and County of San Francisco*, 231 U. S. 669. That court accepted the construction of the charter of the city and county which had been put upon such charter by the State courts, as, indeed, it was bound to do. It stated the great amount of clerical assistance given said clerk by said charter, and the provision requiring the clerk to apply to the mayor for additional assistance if needed. The State court had held that the provisions of the charter were meant to provide for all services which could be required of the clerk, and for all employees he might need in performing all such services. The Supreme Court of the United States accepted that construction as correct. There are things said by the latter court which do not harmonize with what was held by the courts of Massachusetts, Utah, Oregon and Indiana. It seems to us, however, that what was actually decided was that the Naturalization Act did not purport to deal with the relations of the clerk to his State; that to so construe it might raise serious questions of power which should be avoided; and that the Naturalization Act could be satisfied without put-

ting the clerk in antagonism with the laws of his State, by leaving the clerk one-half of the fees to such disposition as might be provided by the State law. The State court had held that the clerk had been provided with sufficient clerical assistance to do all the work, or provided means to obtain additional assistance, which the clerk was required to resort to if needed; and had held that his contract with the city and county required him to turn his fees into its treasury every twenty-four hours. The Supreme Court of the United States, finding that the work had been done, and that the State court had determined that a sufficient clerical force had been provided by the city and county, refused to interfere with the decision of the highest court of the State as to the meaning of the contract between the clerk and the municipality. We think it obvious, from the tenor of the decision, that if the State courts had decided the other way, that decision would have been equally approved. The real point of the Federal decision is that the clerical force having been provided and paid for by the city and county, the United States will not interfere with the conclusion of the highest State court as to the disposition to be finally made of the one-half of the fees retained by the clerk. The Federal court does not discuss the question of the duty and right of the clerk to obtain additional clerical assistance out of his half of the fees if the county authorities refuse or fail to furnish him with the clerical assistance needed to do the naturalization work.

The decision of the Supreme Court of the United States in the *Mulcrevy* case, *supra*, throws doubt upon what we would otherwise regard as clear; yet in view of the fact that it had there been determined by the court of last resort in the State that the necessary clerical force had been provided by the city and county, and that the nature of the contract between the clerk and the municipality had been construed by the court

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of last resort on that subject, and in view of the language we have quoted from the Naturalization Act, commanding the clerk to pay, from the fees received by him in naturalization proceedings, all additional clerical force required to perform his duty on naturalization cases, and that this and similar language of the act is not discussed by the Supreme Court of the United States, we conclude that the courts of Illinois are left entirely free to decide the question here presented in such manner as our courts conclude is most consonant with the language and purposes of the Federal act and of our constitution and laws. It is our conclusion that the provisions of our Constitution and laws requiring clerks of courts to pay the fees received by them into the county treasury were intended to legislate only concerning services performed by such clerks under the statutes of this State; that the provisions of the Federal laws in behalf of clerks of courts were intended to enable them to procure such clerical assistance as they might require in performing their duty under the Naturalization Act without casting any burden upon the county or the State, and that the county has no claim upon such money, and especially so in this case, where the pleader has not alleged that any clerical force for the work of naturalization had been provided or paid for by the county, but the liability is alleged to exist solely because the clerk received said fees and did not pay them into the county treasury.

The judgments are therefore affirmed.

Affirmed.

Mary Vail, Appellee, v. North American Union, Appellant.**Gen. No. 5,954.**

1. EVIDENCE, § 48*—*when burden of proof on defendant.* Where a defendant pleads the general issue and special defenses, the burden of proving the special defenses is on defendant.

2. INSURANCE, § 891*—*when statement of attending physician as to cause of death competent evidence.* In an action to recover upon a certificate of insurance issued by a beneficiary society, a sworn statement as to the cause of the death by the physician attending the deceased, made in response to interrogatories made by the society and filed with the proofs of death, is competent evidence for defendant.

3. INSURANCE, § 842*—*when alcoholism defense to action on certificate of life insurance.* Where the laws of a beneficiary society provide that any member who shall use intoxicating liquors to such excess as to endanger his life or materially to affect the risk on his life, shall forfeit all benefits from the society, and if his death is caused by or due directly or indirectly to such use of intoxicating liquors, all claims which his beneficiaries might otherwise have had upon the society shall be null and void, in order that the use of such liquors by deceased shall be a defense, it must appear that his death was caused directly or indirectly by such use of intoxicating liquors as endangered his life or materially affected the risk upon it.

4. INSURANCE, § 890*—*what effect to be given statement in proof of death.* The beneficiary in a certificate of life insurance, issued by a beneficiary society, in making the proofs of death signed a form which contained the statement that the proofs had been executed at her special instance and request and that the statements therein were adopted by her and agreed to as the basis of the claim. It was held that the statement was not to be construed as a waiver of claim and an acknowledgment that the claim is void, but should be liberally construed in her favor.

5. INSURANCE, § 907*—*when alcoholism of insured not established.* Evidence as to excessive use of intoxicating liquor by insured examined and held to be sufficient to warrant a finding by the jury in favor of plaintiff, in action on insurance certificate.

Appeal from the Circuit Court of Lee county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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term, 1913. Affirmed. Opinion filed July 31, 1914. Rehearing granted and opinion filed January 6, 1915.

ARTHUR G. HARRIS and WILLIAM H. WINN, for appellant.

HENRY S. DIXON and GEORGE C. DIXON, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

The American Stars of Equity, a beneficiary society, issued a certificate on the life of John Vail, payable to his wife, Mary Vail. He died and proofs of death were furnished and the claim was not paid. Thereafter the business of the American Stars of Equity was transferred to the North American Union, and the latter assumed the liabilities of the former. Thereafter, Mrs. Vail sued the North American Union upon said certificate and filed a proper declaration. Defendant filed an amended plea of the general issue, with an amended notice of two special defenses. There was a jury trial. Plaintiff introduced the certificate and the proofs of death and proved the assumption of the liabilities of the former society by the defendant and the amount due and made a case under the general issue, and there was no contrary evidence under the general issue. There was a verdict for plaintiff for \$781.39, and answers to special interrogatories requested by defendant. These questions were whether, at the time Vail made application for membership, he was an habitual user of spirituous liquors, whether prior to such application he had been an immoderate user of spirituous liquors, and whether his death was due directly or indirectly to the excessive use of intoxicating liquors. These questions were answered "No." A motion by defendant for a new trial was denied and plaintiff had judgment and defendant appeals. The burden was upon defendant

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to prove its special defenses, and the only question on this subject is whether the jury should have found the other way on either of those defenses.

The laws of the Order provided that any person who obtained membership therein by false statements or misrepresentations in his application for membership should forfeit all benefits which he or his beneficiaries might otherwise be entitled to recover. In the application by Vail for this certificate were the following questions to which he made the following answers:

"Do you use any spirituous or distilled liquors?
No.

"Have you ever used any spirituous liquors? Yes.

"To what extent? Moderate.

"State which you have used. Whiskey."

The amended notice under the general issue alleged that these were false statements and misrepresentations and that John Vail did at the time use spirituous and distilled liquors and had prior thereto used such liquors immoderately. The application was made on March 14th, and the certificate was issued on March 16, 1905.

Defendant proved that in 1902 Vail had pleaded guilty to the charge of drunkenness on two or more occasions and had pleaded guilty to a like offense on two or more occasions in 1906. Various witnesses testified that they had seen him intoxicated at different times. They did not give any date, and each may have been testifying to a different event or several of them may have been testifying to the same occasion. No one testified that this was in the year 1905. Plaintiff produced witnesses who were closely acquainted and associated with Vail in 1905, by whom it was shown that he was not drinking at all in that year. Defendant introduced a bill for divorce, filed by plaintiff against her husband on August 28, 1908, wherein she stated under oath that she was married to Vail in

1882 and that a few years after said marriage he commenced the excessive use of intoxicating liquors, and that for more than two years last past he had been guilty of habitual drunkenness. Two years before the filing of this bill would be August 28, 1906, and this does not prove that he was in the habit of using intoxicating liquors in March, 1905. Many witnesses testified that Vail was a hard-working laboring man, whose services were worth more and brought more than those of an ordinary laboring man, and that he sometimes drank liquor. Many of them testified that he never drank it to excess to their knowledge. Some of them had seen him intoxicated on remote occasions. By his application he revealed to the Order that he had used whisky in moderation. Obviously what would be such moderation is a matter upon which people would differ. It is worthy of note that the laws of the Order provided that, upon credible information being received that a member is using intoxicating liquors to such an excess as to endanger his life or to materially affect the risk upon his life or to materially bring discredit upon the Order, an investigation should be made and, if the charge was found to be true, the offending member should be suspended.

Various officers of the local society testified, and it appeared from their evidence that they knew, that Vail drank liquor to some extent or they had smelled it upon his breath. They never caused such an investigation to be made, but took dues from him to the end of his life. The officer who received the dues knew that he drank to some extent. The fact that the Order did not suspend him or conduct an investigation, but continued to receive his dues, tends to show that its officers did not consider that he had obtained his membership by false statements or was drinking to an extent which endangered the risk.

The laws of the Order provided that any member who shall use intoxicating liquor to such excess as

to endanger his life or to materially affect the risk on his life shall forfeit all benefits from the society, and if his death is caused by or due directly or indirectly to such use of intoxicating liquors, all claims which his beneficiaries might otherwise have had upon the Order shall be null and void. Defendant claims that the death of Vail was due to alcoholism and that by reason thereof plaintiff cannot recover, and also that that fact is conclusively established by the affidavit of the attending physician, filed with the proofs of death. The proofs of death were upon forms provided by the society for that purpose and, among other things, the society required answers to numerous interrogatories by the attending physician. In his certificate that physician stated that the remote cause of the death of Vail and predisposing cause was gastritis and passive congestion of the lungs. He was asked if there was any special cause, direct or indirect, for the death in the habits, occupation or residence of the deceased and he answered "Alcoholism." He was asked if deceased used alcoholic beverages of any kind and he answered "Yes." He was asked: "If so, to what extent?" and he answered, "Drinks whiskey, sometimes to excess; not a steady drinker; periodical; sometimes months without drinking." He was asked: "With what effect?" He answered, "As stated," with a reference following to the answer about his drinking whisky. On another form, furnished and required by the society, Mrs. Vail was made to say that these proofs of death had been executed at her special instance and request and that the statements therein contained were adopted by her and agreed to as the basis of the claim. The sworn statement by the physician was competent evidence for the defendant. The physician was not called as a witness. The only times when he ever saw deceased, so far as that statement shows, were from February 12 to February 15, 1913, and Vail died on February 16, 1913. He gave both

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the immediate cause and the remote cause of Vail's death as gastritis and passive congestion of the lungs. There is nothing to show that he had ever seen Vail at any other time. His statement as to the habits of Vail may have been based upon his own knowledge or it may have been obtained from inquiry which he made of others to enable him to answer these questions. To what extent alcoholism was the special cause of his death and whether it was the direct or indirect cause is not revealed. No opportunity was offered plaintiff to cross-examine him and ascertain the grounds of his conclusions. In order to avoid the certificate on the grounds above stated, it must appear that his death was caused directly or indirectly by such use of intoxicating liquors as endangered his life or materially affected the risk upon his life. The affidavit of the physician did not state that deceased had made such a use of intoxicating liquors. It is obvious that plaintiff, in stating that the various affidavits connected with the proofs of death had been executed at her instance and that she adopted the statements therein as the basis of her claim, did not mean to waive her claim upon this policy. If she meant that she thereby conceded that this policy was void, she would not have executed any proofs of death at all. She was attempting to assert a valid claim, and we think she should not be conclusively defeated by the affidavit of the physician merely because of the printed words which the society required her to sign in order to present a claim. We think that the language of Mrs. Vail in these printed forms furnished by the society, and by no means decisive against her, should be liberally construed in her favor under the familiar principles referred to in *Zeman v. North American Union*, 263 Ill. 304. There was no other direct proof that Vail died of alcoholism. Other physicians testified for defendant that gastritis and passive congestion of the lungs were attributable to various causes and, among

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others, to alcoholism. There was positive proof that for three months and more before his death, and while he was able to be about and at work, he drank no intoxicating liquors, and that his death was caused by pneumonia, preceded by a hard cold.

The jury decided these issues for the plaintiff. The trial judge, who saw the witnesses and heard them testify, approved those findings. We are unable to say that the jury should have found the other way or that the trial judge should have granted a new trial.

The judgment is therefore affirmed.

Affirmed.

Annie E. Stephenson, Appellee, v. Francis G. Porter et al.

William A. Rogan, Appellant.

Gen. No. 5,980.

1. PLEADING, § 321*—*when verification of cross-bill sufficient.* An affidavit to a cross-bill which states that the contents thereof are true, "except as to those matters therein stated to be on information and belief, and that as to those matters he verily believes the same to be true," is an absolute verification of all the allegations of the cross-bill, except such as are expressly stated to be on information and belief.

2. MORTGAGES, § 515*—*how application by cross-complainant for appointment of receiver supported where evidence not offered.* Where, on a bill to foreclose a trust deed, a defendant files a cross-bill to foreclose a second trust deed and moves for the appointment of a receiver of the rents and profits and offers no evidence in support of his application, it must be supported only by those allegations of fact in his bill which are not therein stated to be on information and belief.

3. MORTGAGES, § 514*—*when receiver of rents and profits not appointed in action to foreclose.* The application for the appointment

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of a receiver of rents and profits, made by a cross-complainant who has filed a cross-bill to foreclose a second trust deed in a proceeding to foreclose a trust deed on the property, will not be granted, even though the second trust deed, which secures a principal sum of \$3,000, with interest, pledges the rents and profits for the debt, where the evidence shows that the value of the property is over \$20,000, that there is an existing offer of over \$19,000 for the property and furniture, to secure the performance of which \$6,000 has been deposited, and that the liens proven to exist are only \$13,000 and about one year's interest.

Interlocutory appeal from the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding. Heard in this court. Reversed. Opinion filed January 16, 1915.

ELBRIDGE HANEY and JOHN F. GAVIN, for appellant.

PARKER H. HOAG and FREDERICK ULLMANN, JR., for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Annie E. Stephenson filed a bill in equity against Francis G. Porter and others to foreclose a trust deed of real estate, securing a debt for the principal sum of \$10,000 with interest. George L. Miller, a defendant, answered and filed a cross-bill to foreclose a second trust deed of said real estate, securing a debt for the principal sum of \$3,000 with interest. He then moved for the appointment of a receiver of the rents and profits. The application was heard. William A. Rogan, who had become the owner of the equity of redemption and was a defendant to both bills, resisted the application. A receiver was appointed and a proper bond for the cross-complainant and proper bond of the receiver were each approved and filed. Rogan preserved the evidence by a certificate and appeals from the order appointing the receiver.

The affidavit to the cross-bill states that the contents thereof are true, "except as to those matters *therein*

stated to be on information and belief, and that as to those matters he verily believes the same to be true." Appellant contends that this affidavit puts all the allegations of the cross-bill upon information and belief. The cases which he relies upon were where the words "to be" in the first part of the above quotation were absent. The one form refers the court to the language of the bill itself to ascertain what is therein stated to be on information and belief. The other form requires a search into the mind of the pleader or of the affiant to learn what he intended to state on information and belief. Of many cases holding the first form positive and sufficient and the second form uncertain and insufficient, we refer to *Stirlen v. Neustadt*, 50 Ill. App. 378; *Christian Hospital v. People*, 125 Ill. App. 631; and *Von der Leck v. Baldwin County Colonization Co.*, 178 Ill. App. 93. We regard it as settled that this affidavit is an absolute verification of all the allegations of the cross-bill, except where the cross-bill states expressly that the allegation is on information and belief.

Cross-complainant offered no evidence in support of his application for a receiver. It must therefore be supported, if at all, only by those allegations of fact in his bill which are not therein stated to be on information and belief. The existence of these two incumbrances for a total of \$13,000 and interest is so established. The first instrument was dated May 1, 1913, and this application for a receiver was heard on May 9, 1914, so that the interest is not a large amount. There are allegations in the cross-bill of various notices for mechanic's liens for various amounts, but these are all alleged on information and belief and must be disregarded. Appellant proved against the application, by several witnesses, that the property was then worth more than \$20,000 and that it was at that very time under an offer to buy the same, and

furniture in the dwelling house valued at \$1,000 for over \$19,000, and that the proposed purchaser had deposited \$6,000 with the Chicago Title & Trust Company upon his offer to purchase the same. It is clear that the second trust deed pledged the rents and profits for this debt. The principles governing such a case are sufficiently laid down in *First Nat. Bank of Joliet v. Illinois Steel Co.*, 174 Ill. 140; *Bagley v. Illinois Trust & Savings Bank*, 199 Ill. 76; and *Ball v. Marske*, 202 Ill. 31. The *Bagley* case, *supra*, however, shows that though the fact that the trust deed gives a lien upon the rents and profits is to be considered in determining whether the power of the court to appoint a receiver should be exercised, yet the court is not bound to enforce it where it is not necessary for the security of the debt. We conclude that in this case, where the property is not only proven by several witnesses to be worth over \$20,000 but an existing offer is shown to pay therefor (with furniture) over \$19,000 with a substantial sum deposited to secure its performance, and the liens proven to exist are only \$13,000 and about one year's interest, the court should not have appointed a receiver, and that it was not necessary to do so in order to make the cross-complainant entirely secure.

The order appointing the receiver is therefore reversed.

Reversed.

Minnie Hull, Appellant, v. James D. Hull, Appellee.**Gen. No. 5,984.**

MARRIAGE, § 29*—*when false representations by husband as to his chastity not ground for annulment.* False representations by a man before marriage, made to his intended wife, as to his not having had intercourse with other women are not ground for annulment of the marriage by the wife.

Appeal from the Circuit Court of Kankakee county; the Hon. CHARLES B. CAMPBELL, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

WALTER C. SCHNEIDER, for appellant.

JAMES L. DOUGHERTY and SAVARY & RUEL, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On October 25, 1913, appellee married appellant. On November 28, 1913, appellant left her husband, and on December 8, 1913, she filed this bill against her husband to annul the marriage. A demurrer to the bill by defendant was sustained, and complainant elected to abide by her bill, and it was dismissed at her costs. This is an appeal by her from said decree.

In the bill appellant alleged that she was chaste when she married appellee; that her consent to the marriage was procured by appellee by material false and fraudulent representations, in this, that he represented to her that he was a chaste person and had never had sexual intercourse with other women, and that a woman named Hall was charging him with being the father of her unborn child in order to cause him to marry her, but that he had never had sexual inter-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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course with said woman and was not the father of said unborn child. The bill averred that appellant made due inquiry regarding said statements, and that appellee repeatedly affirmed that he was innocent of said charge, and that she believed and relied upon his representations, and in reliance thereon married him; that in fact said statements were untrue, and that he had had frequent sexual intercourse with said woman named Hall, and that said Hall woman is and was at the time of said marriage pregnant with a child of which appellee is the father, and that appellee well knew these facts when he made said representations and knew that they were untrue; that the relatives of said Hall woman have threatened to prosecute him for bastardy and that appellee will be forced to pay her large sums of money under the laws of this State, and that he is a poor man and will be unable to pay such sums and also support appellee and appellant, and that since said marriage she has been informed and believes and charges the fact to be that he is the father of divers other illegitimate children, and that he fled from his former home in Kentucky to avoid prosecution for such acts. The bill further alleged that she did not know of the falseness of these representations until November 28, 1913, and she then immediately left him and ever since remained away from him; and that if she had known that appellee was the father of said unborn child and had been unchaste she would not have consented to marry him; and that he married appellant merely to protect himself against the charges of said Hall woman.

The argument for appellant is that, under the law, if a man marries a woman who is pregnant by another man, and she has concealed that fact from him, and he has not had intercourse with her before the marriage, the marriage may be annulled; and that there ought to be the same law for a man as for a woman; and that, if that rule is applied to this case, this mar-

riage should be annulled. We concur with appellant that the law should apply equally to the man and to the woman, and we hold that it does so apply equally. But the cases supposed by the argument to be the same are radically different. When a man marries a woman, not his paramour, at a time when she is pregnant by another man, which fact she has concealed from her intended husband, different courts have given two reasons why the marriage shall be held voidable. One is, that by the fact of existing pregnancy the woman is incapable of bearing a child to her husband at that time, and is unable to fully perform the contract implied in marriage. The other, and, we think, the true ground for holding the marriage voidable, is that thereby there is brought into the marriage relation, and into the home of the husband and wife, an infant which is in fact not the child of the husband, but which is presumed by the law to be his child until the contrary is established. He must suffer the child to be considered his own, though begotten by another man before marriage, or he must begin proceedings by which shame will be brought upon his wife. The husband is not bound to support such a child, and its presence in the home is likely to produce great discord. This is held to be a fraud, the results of which are of the gravest character. *Reynolds v. Reynolds*, 3 Allen (Mass.) 605. If, however, some other woman is pregnant by the husband, the child is not born into the family nor brought into the home of the husband and wife, and no question of its legitimacy and right to inherit the property of the husband is involved. It is well settled in nearly all of the States of the Union that concealment or misrepresentation concerning the party's health, character, wealth, social position, previous history or habits, does not furnish sufficient cause for the annulment of the marriage, and that false representations as to the previous chastity of either party to the intended marriage are not ground for annulling

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it. Tiffany on Domestic Relations, 10; 19 Am. & Eng. Encyc. of Law (2nd Ed.) 1183-1188; 26 Cyc. 899-907. These principles are laid down in numerous cases cited in the foregoing authorities, and they are equally applicable whether the false representations of chastity were made by the man or by the woman. The consequences of the birth of a bastard child outside the marriage relation are so different from the consequences of the birth of such a child within that relation that the same legal results to the marriage relation should not follow from the one as from the other. If, as is held in the authorities above cited, the fact that a woman concealed from her intended husband that she had been a prostitute would not authorize an annulment of the marriage at the suit of the husband, when he discovers that fact, no reason is perceived for the claim that the man and the woman are not, in this respect, treated equally before the law.

The decree is affirmed.

Affirmed.

**Frederick B. Townsend, Appellant, v. A. D. Gash et al.,
Appellees.**

Gen. No. 5,994.

1. APPEAL AND ERROR, § 1137*—*what effect of denial of motion to dismiss appeal because State real defendant.* Even though a motion in the Appellate Court to dismiss an appeal on the ground that the State is the real defendant be denied, the denial does not remove the question from the case.

2. COURTS, § 83*—*when Circuit Court has jurisdiction of suit against State officers.* The Circuit Court has jurisdiction of a bill by a taxpayer to declare void a contract by the State Highway Commission for the purchase of cement for the construction of State aid

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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roads and to enjoin the Commission from purchasing material for the construction of such roads.

3. **APPEAL AND ERROR, § 208***—*when appeal in cases involving revenue lies to Appellate Court.* A suit by a taxpayer to declare void a contract of the State Highway Commission for the purchase of cement for the construction of State aid roads, and to enjoin the Commission from purchasing material for the construction of such roads, does not involve the revenue directly but only indirectly, and the indirect reference to the revenue does not authorize an appeal direct to the Supreme Court.

4. **APPEAL AND ERROR, § 219***—*when lies to Supreme Court in proceeding in which State directly interested.* Where a suit is brought by a taxpayer to declare void a contract of the State Highway Commission for the purchase of cement for the construction of State aid roads and to enjoin the Commission from purchasing any material for the construction of such roads, the State is directly interested and the appeal therein lies directly to the Supreme Court and not to the Appellate Court.

Appeal from the Circuit Court of De Kalb county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1914. Transferred to Supreme Court. Opinion filed January 6, 1915.

FAISSLER, FULTON & ROBERTS and KNAPP & CAMPBELL, for appellant; JOHN R. COCHRAN, of counsel.

P. J. LUCEY, Attorney General, GEORGE P. RAMSEY and DUNCAN & O'CONOR, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

On June 20, 1914, Townsend, a citizen and taxpayer of DeKalb county, filed a bill in equity, and afterwards an amended bill, against the State Highway Commission and the Marquette Cement Manufacturing Company. The amended bill alleged that said Commission advertised for bids for furnishing all the cement required in the construction of all State aid roads in this State during 1914; that the Marquette Cement Manufacturing Company was the lowest bid-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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der, and that the contract therefore was made with it; that said Commission directed the preparation of specifications for the construction of State aid roads, requiring cement in such construction, and providing that the State shall furnish such cement at certain prices specified, and advertised for bids in many counties of the State for the construction of such State aid roads and for the furnishing of all materials, except cement, required therefor, and intends to let contracts thereunder and will expend about \$400,000 for cement in 1914, and will purchase all said cement of said Marquette Cement Manufacturing Company for the year 1914, and will compel the use of the same. The amended bill further alleged that the statute does not authorize said Commission to purchase such cement for the construction of State aid roads, and that such contract is void for want of authority in the Commission to make the same, and that said Commission, unless restrained, will purchase large quantities of cement under said contract and will issue orders to the auditor of public accounts for warrants on the State treasurer for payment for such cement out of the State funds derived by taxation upon the property of the complainant and all other taxpayers, and if such orders are issued and such warrants are drawn and paid, this will constitute an unlawful expenditure of public funds. The prayer was that said contract be declared void, that the State Highway Commission be enjoined from purchasing cement or any other material for the construction of State aid roads, and from issuing any order authorizing the auditor of public accounts to draw his warrant upon the State treasurer for the payment of any public moneys for cement so purchased. The specifications and the contract are exhibits to the bill. The defendants filed a special demurrer. It was stipulated that the court should hear the cause upon the amended bill and the demurrer thereto and the motion by complainant for

an injunction and should enter a final decree, either granting a permanent injunction or dismissing the bill for want of equity. The court sustained the demurrer and complainant elected to stand by the amended bill and it was dismissed for want of equity, and the complainant appealed to this court.

Appellees moved to dismiss the appeal and to transfer the cause to the Supreme Court. These motions were inconsistent, but we entertained them both. The motion to dismiss the appeal was based upon the contention that the State is the real defendant and that for that reason the suit cannot be maintained. We denied that motion, but the question is still in the case, for if the State is the real defendant then no court can acquire jurisdiction of this cause, under section 26 of article IV of the Constitution, which provides that "The State of Illinois shall never be made defendant in any court of law or equity." We are of opinion that the Circuit Court had jurisdiction of the cause against these State officers, under the principles laid down in *Joos v. Illinois Nat. Guard*, 257 Ill. 138, and *Burke v. Snively*, 208 Ill. 328.

The motion to transfer the cause to the Supreme Court we took with the case. It was based upon the contention that the appeal lies to the Supreme Court and not to this court, under section 118 of the Practice Act of 1907 (J. & A. ¶ 8655), which provides for appeals from the Circuit Court to the Supreme Court, among other cases, "in all cases relating to revenue or in which the State is interested as a party or otherwise." It is decided in many cases that in order to require an appeal to the Supreme Court on the ground that a case relates to revenue, the revenue must be directly and not indirectly involved. Among other cases are *Reed v. Village of Chatsworth*, 201 Ill. 481; *People v. Turnbull*, 256 Ill. 532, and cases there cited. This case does not directly involve the revenue. If the appeal should have been to the Supreme Court

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direct it must be on the ground that the State is interested, otherwise than as a party. The provision above quoted from the Practice Act of 1907 has been a part of the statute since it was incorporated into section 88 of the Practice Act in 1879 (Laws of 1879, p. 222). After that amendment, section 8 of the Act establishing Appellate Courts (J. & A. ¶ 2968) was amended and in terms provided what cases should be taken to the Supreme Court and did not include cases relating to the revenue or in which the State is interested. It was held in *Dement v. Rokker*, 126 Ill. 174, that said last-named act was applicable only to Appellate Courts, and that it did not affect the jurisdiction conferred upon the Supreme Court by said amended section 88 of the Practice Act. That was a suit for a mandamus against the commissioners of State contracts and the auditor of public accounts to compel said commissioners to certify the accounts of certain printers to the auditor of public accounts, and to compel said auditor to draw his warrant in favor of the printers upon the State treasurer for a certain sum, payable out of a certain appropriation, and commanding the treasurer to pay the same. The Supreme Court there took jurisdiction of an appeal direct from the Circuit Court, after consideration of the question. That court did not expressly state upon what clause of the statute it based its jurisdiction of a direct appeal from the Circuit Court. Apparently it was not upon the ground that the suit related to the revenue, but must have been upon the ground that the State was interested, and it must have been upon the ground that the State was directly and substantially interested, for it is elsewhere held that the interest which authorizes such an appeal must be a direct and substantial interest. *Hitchcock v. Greene*, 252 Ill. 519; *People v. Rodenberg*, 259 Ill. 78. *Dement v. Rokker*, *supra*, must therefore be considered as holding that that was a case in which the State was directly and

substantially interested. In *Canal Commissioners v. Sanitary Dist. of Chicago*, 191 Ill. 326, the canal commissioners filed a bill in the Circuit Court against the sanitary district to compel specific performance of a contract between the said bodies and for an injunction. There was a decree, not satisfactory to either party. The sanitary district appealed to the Appellate Court and the canal commissioners appealed to the Supreme Court, and the sanitary district moved to dismiss the latter appeal. That motion was denied on the ground that the State was directly interested in that suit. It was shown that the State was the owner of the canal, and that the canal commissioners were acting in their official capacity; that the canal was maintained by the State, which made up all deficiencies in the revenue and maintained a board of canal commissioners, with their equipment and employees, to operate the canal as a State enterprise. In the case at bar the State Highway Commission was acting under the first four articles of the codified Road and Bridge Act of 1913. (Laws of 1913, pp. 521-534.) There was thereby created a State Highway Department, whose officers were the State Highway Commission, the chief State highway engineer, and the assistant State highway engineer, appointed by the Governor and serving for a term of years under salaries paid by the State, with the expenses of the department. That act provided that public highways should be selected throughout the State, to be constructed and improved at the joint expense of the State and of the county in which such highway might be, which highways, after they had been so constructed or improved, should thereafter be maintained and kept in repair at the expense of the State. We conclude that within the principles laid down in *Canal Commissioners v. Sanitary Dist. of Chicago*, *supra*, on p. 333, the State is directly interested in this suit. The funds of the State are to be used to pay for cement under the contract here involved. The

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State Highway Commission is acting in its official capacity for the State. After these State aid roads have been completed they are to be thereafter maintained at the State expense. The State aid roads are a State enterprise. We think this conclusion fairly appears from the review of this statute in *Martens v. Brady*, 264 Ill. 178. There are cases where the Supreme Court has taken jurisdiction of such a direct appeal, where the State was apparently no more interested than here, where the question of jurisdiction was not raised, but where we must presume that the Supreme Court would have declined jurisdiction of its own motion if it had not considered that it had jurisdiction. *Joos v. Illinois Nat. Guard*, *supra*, and *Burke v. Snively*, *supra*, are such cases. Our attention is called to cases where, before the act for the transfer of an appeal to the proper court, the Supreme Court dismissed, for want of jurisdiction, direct appeals to that court. We consider most of these cases distinguishable from the case now before us. There are cases, on the border line as to the court to which the appeal should go, where the Supreme Court took jurisdiction of appeals coming to it through the Appellate Court, where the question of jurisdiction of the appeal was not raised or discussed. While these decisions create some doubts upon the question, they do not justify us in attempting to decide the merits of this case, in which we conclude the State is directly interested.

It is therefore ordered that this cause be transferred to the Supreme Court pursuant to section 102 of the Practice Act of 1907 (J. & A. ¶ 8638).

Transferred to the Supreme Court.

**Arthur Keithley, Appellant, v. Mutual Life Insurance
Company of New York, Appellee.**

Gen. No. 6,002.

1. FRAUD, § 18*—*when statements not sufficient ground for action.* An action against a life insurance company for fraud and deceit, in that it misrepresented the value which the policy would have at the end of twenty years, cannot be maintained where the alleged false and fraudulent statements did not relate to existing facts, but consisted in predictions or promises of the company as to the value which the policy would have at the end of twenty years.

2. FRAUD, § 78*—*necessity of averring scienter.* In an action of fraud and deceit, it is necessary to aver scienter.

3. LIMITATION OF ACTIONS, § 46*—*what concealment of cause of action prevents running of statute.* The concealment of a cause of action which will prevent the operation of the statute of limitations must be something of an affirmative character which is intended to prevent and does prevent the discovery of the cause of action.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

McROBERTS, MORGAN & ZIMMERMAN, for appellant.

PAGE, HUNTER, PAGE & DALLWIG, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Arthur Keithley brought an action for fraud and deceit against the Mutual Life Insurance Company of New York and filed a declaration containing two counts. There was a general and special demurrer to each count and it was overruled as to the first count and sustained as to the second count. Defendant filed the general issue and a plea of the statute of limitations. There seem to have been two replications to said second plea and a demurrer to one of said two

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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replications was sustained, but they are not in this record. Thereafter, appellant filed an additional replication to said second plea, and a general and special demurrer thereto was sustained, and appellant elected to stand by said additional replication, and withdrew the former replication, and there was a judgment in bar against appellant, from which he appeals and assigns error in sustaining the demurrer to the second count of the declaration and the demurrer to the additional replication, and in rendering judgment in bar. The sole questions, therefore, are whether the second count stated a cause of action and whether the additional replication was a sufficient reply to the plea of the statute of limitations.

The first count alleged that appellee was an Insurance Company under the laws of the State of New York and that on December 30, 1893, it presented to plaintiff a policy wherein, for \$184 to be paid by appellant to appellee yearly for twenty years, appellant agreed to pay appellant's wife \$5,000 at appellant's death within said twenty years, and if appellant survived that period, then to pay appellant the distributive share of the surplus, plus the legal reserve; that, to induce appellant to accept said policy, appellee falsely and fraudulently represented to appellant that appellee for many years had been issuing such policies to other persons and that the surplus and reserve had never been less than \$5,664.05 on each policy, and that appellee had never paid any such policy holder less than that sum and usually more than that sum, and that if appellant would accept this policy, appellee would certainly pay him, if he was alive at the end of twenty years, not less than \$5,664.05, and probably a larger sum, and stated that the law of the State of New York compelled appellant to pay the holder of such policy at the end of twenty years not less than that sum, and that, if the surplus and legal reserve were greater than that sum, appellant would receive

his proportionate share thereof; that appellant, at the time said representations were made to him, had no other information concerning any of said matters, and believing said representations to be true, accepted said policy and paid appellee \$184 per year for twenty years, and at the expiration of said twenty years appellee did not pay appellant \$5,664.05 or any part thereof, and that thereby an action had accrued to appellant against appellee for said fraud. The second count averred that on December 30, 1893, appellee sold appellant a policy of insurance by which appellee agreed to pay plaintiff in cash at the end of twenty years certain sums determinable upon the amount of surplus of said Company at that time, plus the legal reserve; that appellee did not know and could not know what the surplus or earnings of said Company would be for that period, nor what amount would be due appellant upon said policy at the end of twenty years; but that, to induce appellant to enter into said contract, it falsely and fraudulently represented to him that the surplus of said policy, plus the legal reserve at the end of twenty years, would be \$6,000, and that it would pay plaintiff \$6,000 at that time, and that appellant had no knowledge of the earnings or surplus to become due, except what appellee told him, and appellant relied upon said representations and accepted said policy and paid therefor; but that said policy did not earn \$6,000 and appellee refused to pay plaintiff anything thereon, whereby appellee had defrauded plaintiff. The additional replication to the plea of the statute of limitations charged that appellee fraudulently concealed from plaintiff the fraud which constituted appellant's cause of action herein until within less than five years before the commencement of this suit, and that such fraudulent concealment consisted of the following conduct on the part of appellee. The additional replication then restated the allegations of the first count of the declaration, but not always in

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exactly the same language, and averred that of February 15, 1913, he inquired of appellee what amount would be due him from appellee on said policy when it matured on December 30, 1913, and that the answer of appellee to said question first disclosed to appellant, and appellant then first learned, the fraud perpetrated by the defendant upon the plaintiff in procuring plaintiff to enter into said contract of insurance.

The words "false," "fraudulent" and the like in a pleading are of no avail, in the absence of averments of fact showing that the matter set up was false or was fraudulent. *Fortune v. English*, 226 Ill. 262. The statements alleged in these pleadings to have been false and fraudulent did not relate to any existing fact, but were either predictions or promises as to the state of facts which it was expected would exist twenty years later. In an action for fraud and deceit, the fraud and deceitful representations must be concerning an existing fact or facts. A promise to perform an act, even if the promisor intends not to perform it, is not such a representation as can be made the ground for an action for deceit. *Grubb v. Milan*, 249 Ill. 456.

There is nowhere in the first count any averment that appellee knew that the alleged representations were false, and in an action of fraud and deceit it is necessary to aver scienter. *Cantwell v. Harding*, 249 Ill. 354. Under these principles, which are supported by many cases in Illinois, appellant has not stated a cause of action against appellee for fraud and deceit. Section 22 of the Limitation Act (J. & A. ¶ 7217) provides that if a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the suit may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action. The concealment of a cause of action which will prevent the operation of the statute of limitations must be some-

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thing of an affirmative character, intended to prevent and which does prevent the discovery of the cause of action. *Lancaster v. Springer*, 239 Ill. 472. No affirmative acts nor representations are alleged in this case, by which appellee fraudulently concealed the cause of action. In all these respects the first and second counts and the additional replication are fatally defective.

The judgment is therefore affirmed.

Affirmed.

MR. JUSTICE NIEHAUS took no part in this decision.

Drainage Commissioners of Union Drainage District No. 1 in the Towns of Harmon and Marion in Lee County, Appellees, v. James R. McCormick, Appellant.

Gen. No. 6,020. (Not to be reported in full.)

Appeal from the Circuit Court of Lee county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

Statement of the Case.

Assumpsit by Drainage Commissioners of Union Drainage District No. 1 in the towns of Harmon and Marion in Lee county against James R. McCormick.

Defendant had acted as treasurer of said district for two years. The district, which was organized under the Farm Drainage Act (J. & A. §§ 4475-4556) fixed the compensation of its first treasurer at two per cent.; though the compensation of subsequent treasurers up to defendant's incumbency had not been fixed, they had been paid the same compensation. Defend-

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ant was also paid two per cent. for compensation for the first year of his term and retained \$218 for his compensation for his second year. To recover this amount, plaintiff brought this suit, and a jury having been waived and the case tried on a stipulation as to the facts, the issues were found for plaintiff and its damages assessed at \$218, and it had judgment therefor.

From this judgment, defendant appeals.

HENRY C. WARD, for appellant.

H. A. BROOKS and J. W. WATTS, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. OFFICERS, § 62*—*when not entitled to compensation.* One who accepts a public office for which no compensation has been provided is not entitled to any compensation and cannot appropriate to his own use for that purpose moneys of the office.

2. OFFICERS, § 62*—*when written order for compensation necessary.* Under the Farm Drainage Act, sec. 15b (J. & A. ¶ 4491), a written order of the drainage commissioners is necessary to authorize the treasurer of the drainage district to retain his compensation out of moneys of the district.

Anna Saxton, Appellee, v. Flora Drake, Appellant.

Gen. No. 6,022.

1. EVIDENCE, § 476*—*when preponderance of witnesses not sufficient to show that verdict is contrary to evidence.* Where the evidence is conflicting and there is nothing in the record to show that the jury were not justified in believing that the greater weight of the evidence rested in the plaintiff and her witnesses, the mere fact

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that defendant had the greater number of witnesses is not sufficient on appeal to justify a holding that a verdict for plaintiff was against the weight of the evidence.

2. MASTER AND SERVANT, § 85*—*where modification of instruction proper in action for wages.* In an action by a servant to recover wages, an instruction requested by defendant to the effect if the jury believed that during the time for which the wages were sought plaintiff "was treated and cared for as a member of the family of the defendant," such relation is presumed to continue and the burden of showing a change therein is upon the defendant, is properly modified by adding after the words quoted, the words "and so accepted such treatment."

3. MASTER AND SERVANT, § 85*—*when modification of instruction in action for wages proper.* Where defendant, in an action by a servant for wages, asks an instruction to the effect that if there was an implied understanding between the parties by which each was to receive the services of the other, without any intention of making charges therefor, then neither could recover for her respective services, though the jury might believe there was a difference in the value of such services, a modification of the instruction by adding thereto the words "unless you further believe from the evidence there was an express agreement to pay for such services," is not error, where the change makes the instruction include an element of plaintiff's case which the requested instruction omitted.

4. NEW TRIAL, § 77*—*when newly-discovered evidence not ground for.* Where there is nothing in the record to show that the witnesses, the newly-discovered evidence of whom is urged as a ground for a new trial, could not, by reasonable diligence, have been looked up, their knowledge of the facts ascertained long before the trial, and their attendance at the trial secured, it is not error to refuse to grant a motion for a new trial.

Appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed January 6, 1915.

WOLFENBARGER & MAY, for appellant.

W. M. BARNES, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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This is a suit in assumpsit which was originally brought by the appellee, Anna Saxton, against the appellant, Flora Drake, before a justice of the peace in the city of Peoria, to recover money claimed from the appellant for wages, alleged to be due the appellee under an express verbal contract. A trial was had before the justice, who found that the appellee was entitled to recover, and rendered a judgment for the sum of one hundred and fifty dollars. The appellant then took an appeal to the Circuit Court, where the case was tried *de novo* by a jury, and a verdict was rendered finding the issues for appellee and assessing her damages at two hundred dollars. The appellant made a motion for a new trial and filed, in support of her motion, affidavits which set forth newly-discovered evidence.

The court, upon considering the motion, ordered the appellee to enter a remittitur of fifty dollars, which was done by her, and thereupon the motion for a new trial was denied, and a judgment entered on the verdict for the sum of one hundred and fifty dollars against the appellant, from which judgment she has appealed to this court. The principal errors assigned by appellant and urged as ground for the reversal of this judgment are:

(1) That the verdict of the jury is manifestly against the weight of the evidence; (2) that the court improperly modified two of the appellant's instructions, and refused to give one of the instructions requested by the appellant; (3) that the court should have granted a new trial on account of the newly-discovered evidence.

While appellant has an apparent basis for claiming that the verdict is against the weight of the evidence, inasmuch as one more witness testified in support of appellant's side of the controversy than on the side of the appellee, yet the number of witnesses does not necessarily determine the weight of the evidence.

This seems too well settled to require any elucidation. The credibility of witnesses is always a large and important factor in determining the question of the weight of the evidence. The evidence in this case was very conflicting and contradictory, and the jury, who saw all the witnesses, observed their demeanor on the witness stand and their manner of testifying, their intelligence and candor, or lack of it, and considered the reasonableness or unreasonableness, the probability or improbability of the matters about which they testified, are in the best position to form a correct conclusion in determining the question of the relative credibility of the witnesses, and the relative weight of their testimony. To pass upon the credibility of witnesses who testify in a case and the relative weight of their testimony is the peculiar function of the jury.

This court cannot say from anything that appears in the record that the jury were not justified in believing that the greater weight of the evidence rested in the testimony of appellee and her witnesses, though there were a greater number of witnesses on the side of the appellant.

The rule laid down by the Supreme Court in the case of *Lowry v. Orr*, 6 Ill. (1 Gilm.) 70, has been constantly adhered to in this State, and in our opinion is decisive of the question now under discussion. The Court in that case says: "Where there is a contrariety of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inferences of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength or weight of the testimony. So, where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge of that credibility, to attach such weight to the testimony of each, as may seem to be proper, after a due consideration of all the circumstances, arising in the particular case."

In considering the errors assigned in connection with the modification and refusal of instructions, we find that the court gave four instructions on the part of the appellant, two of which, namely, Nos. 3 and 4, were modified, and one instruction requested by the appellant was refused.

Instruction No. 3 was modified by interlining the words, "and so accepted such treatment," which made the instruction read as follows:

"You are instructed that if you believe from the evidence that during the period in question in this case, the plaintiff was treated and cared for as a member of the family of the defendant and so accepted such treatment, then you are instructed that such family relation is presumed to continue and the burden is upon the party alleging a change of such relation to prove such change."

Instruction No. 4 was modified by adding at the end the words, "unless you further believe from the evidence there was an express agreement to pay for such services," making the instruction read as follows:

"You are instructed that if you believe from the evidence that the plaintiff and the defendant understood that they were each receiving services from the other with no then present intention of making any charges therefor, then you are instructed that neither can recover of the other for any such services performed, even though you may believe from the evidence there was a difference in the value of such services, unless you further believe from the evidence there was an express agreement to pay for such services."

We are of opinion that these modifications of instructions were proper. Instruction No. 3 as presented, embodied the assertion that if the appellee was treated and cared for as a member of the family of the appellant, that such relation is presumed to continue, and that the burden is upon the party alleging a change of such relation to prove it. The relation mentioned would not be presumed in law to continue, unless it was first established, and to establish it would require

not only that the treatment and care be given to appellee as a recognition of such family relation by the appellant, but also the recognition of such family relation by the appellee, by such acceptance of care and treatment as would indicate that she regarded herself as a member of the family, and did not receive the same merely as a servant of the family. By the interlineation of the words mentioned, the instruction, we think, more accurately expressed the law upon the point involved, as applicable to the matters in controversy in the case, and the modification was therefore proper.

The fourth instruction, without the modification, is to this effect: That if there was an implied understanding between the parties by which each was to receive the services of the other, without any intention of making charges therefor, then neither could recover for her respective services, though the jury might believe that there was a difference in the value of such services. While the proposition of law set out in this instruction is not incorrect, it did not state the whole of the question involved, in its application to the case. The appellee claimed that there was an express agreement between her and the appellant, by which she was to receive a definite amount of wages for her services; and if this was proven, the implication suggested by the instruction would not arise to defeat her right of recovery under the express contract. The modification broadened the scope of the instruction to meet this additional element, which was a part of the controversy and was therefore proper.

The refused instruction which the appellant presented to the court to be given to the jury does not accurately state the law as applicable to the controversy. The appellee might have resided with the appellant as a member of her family, and received care, support and attention as such, and no charge be made for such care, support and attention by appellant, yet at the same time she might also have had an express agree-

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ment with appellant, as she claims she did, to receive a certain amount of pay for the work she was to perform for appellant. Under this instruction, even though the greater weight of the evidence should show that appellee had such an agreement, she would not be entitled to receive a verdict in her favor. The instruction was therefore properly refused.

But it is insisted that the court should have granted a new trial on account of newly-discovered evidence, which is set forth in the affidavits of G. C. Seddon and A. H. Eifert.

In order to entitle a party to a new trial on the ground of newly-discovered evidence, it must clearly appear that the party could not have procured such evidence at the previous trial, by the exercise of reasonable diligence. In the case of *Wright v. Gould*, 73 Ill. 56, the Supreme Court, in deciding the point in question, used the following significant language:

“Waiving all other objections which might be taken to the sufficiency of this affidavit, it is palpably defective in not showing that Dagan’s evidence could not have been discovered and produced on the trial by the use of reasonable diligence. His affidavit shows that he would have contradicted certain statements sworn by certain of appellees’ witnesses to have been made by himself, with regard to the quantity of flax seed received by appellants. It does not appear that Dagan could not have been found, and the correctness of those statements learned in time to have used his evidence, if it had been found desirable, before the trial concluded. A party is not allowed, on a motion for new trial, to avail of his ignorance of evidence which he could have discovered in apt time, by the exercise of reasonable forethought and diligence. His affidavit should have negatived every circumstance from which negligence may be inferred.”

In this case, about four months intervened between the time of the commencement of the suit and the time of the trial in the Circuit Court. This gave appellant ample time to look up all the evidence pertaining to

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her side of the case. The witnesses in question resided in the city of Peoria, and appellant knew they had been boarders at her house during part of the time that appellee worked there, and that naturally they might know something concerning the matters in controversy between her and the appellee.

There is nothing in the record to show why the appellant could not, by the exercise of reasonable diligence, have looked up the witnesses and ascertained from them what they claimed to know about the case long before the time of the trial in the Circuit Court, and to have had them in attendance at that trial if she desired to avail herself of their testimony. In not doing so, the appellant was clearly lacking in reasonable diligence, and the court below was therefore fully justified in refusing to grant a new trial on the ground of this newly-discovered evidence.

We are of opinion that the motion for a new trial was properly denied, and that a judgment should have been rendered upon the verdict.

Judgment affirmed.

Affirmed.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1915.

**John F. Devine, Administrator, Plaintiff in Error, v.
Illinois Central Railroad Company and Blue Island
Car & Equipment Company, Defendants in Error.**

Gen. No. 18,723. (Not to be reported in full.)

Error to the Superior Court of Cook County; the Hon. HUGO PAM,
Judge, presiding. Heard in the Branch Appellate Court at the
March term, 1913. Affirmed in part, reversed in part and remanded.
Opinion filed February 3, 1915.

Statement of the Case.

Action by John F. Devine, suing as the administrator of the estate of Russell S. Scott, deceased, against the Illinois Central Railroad Company, a corporation, and Blue Island Car & Equipment Company, a corporation, for the wrongful death of plaintiff's intes-

tate. From separate judgments against the plaintiff in favor of defendants upon directed verdicts, plaintiff brings error.

On October 29, 1908, the defendant Equipment Company operated a plant for the manufacture and repair of freight cars. At the southwest corner of the enclosure was a double gate which was ordinarily kept closed and locked. The Railroad Company maintained a single track which ran into the plant through a double gate, where it connected with a system of tracks belonging to the Equipment Company running through the plant. The space between the westerly track and the next track to the east was used by the Equipment Company for storage and for the piling thereon of "kindall frames," which were T-shaped, constructed of wrought iron, six or seven feet in height, having a bottom width of about three feet, and weighing about two tons each. As so placed or piled in said space there was usually a distance of about eight inches between the frames and the body of cars of ordinary width, passing on the westerly track. The frames were removed from time to time as required for use, but the frames in question had remained where they stood at the time of the accident for about five days. The deceased was employed by the Equipment Company as a night watchman, and among his duties was to open and close the gates, and to deliver orders from his superintendent to incoming train crews with reference to the disposition of cars hauled within the plant. At about ten o'clock on the night in question, a crew of the Railroad Company approached the gates with a train consisting of a locomotive, three cars and a caboose, and gave the usual signal for the gates to be opened. The deceased opened the gates in response to the signal and delivered an order for the placing of the cars to the conductor. The cars were of the gon-

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dola type and the one in question was loaded to its capacity with lumber. The end gates of said car were turned down upon the platform and the lumber was piled upon the platform and held in place by the upright sides. As the train entered the plant of the Equipment Company the cars were ahead. The train thus backed in slowly, and the deceased and McCarthy, a switchman employed by the Railroad Company, walked upon the track ahead of the cars. When the head car, being the one in question, reached the point where the frames were standing, it came in contact with one or more of said frames, causing the same to fall. As the frames were falling, the deceased ran to the right to avoid some anticipated danger and was struck by one of the falling frames and injured, from which injuries he died. An examination of the car made early the following morning disclosed that both sides of the car were bulged out, the east side, being the side which had come in contact with the frames, more than the other; that the east side was bulged out six or seven inches at the top; that the upright stakes which supported that side of the car fit into iron pockets which were bolted to the under sill; that the bolts had been drawn into the wood of the sill, thus permitting the pockets to enlarge and the stakes to sway out; that there was a fresh mark or cut on the front stake about eighteen inches from the top and a like mark or cut on the sill; that one of the grab irons appeared to have been recently torn off. The car was loaded solidly with oak planks placed "back and forth" tier upon tier. Prior to the accident, and while the frames were in the same position, the Railroad Company had made frequent deliveries of cars within the plant of the Equipment Company, upon which occasion the cars operated upon the track in question had safely cleared said frames.

JOHNSON & BELASCO, for plaintiff in error.

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CALHOUN, LYFORD & SHEEAN, for defendant in error, Illinois Central Railroad Company; JOHN G. DRENNAN, of counsel.

H. B. BALE and ROSE, SYMMES & KIRKLAND, for defendant in error, Blue Island Car & Equipment Company.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 48*—*what constitutes proximate cause.* In an action for personal injuries, where either of two causes may produce a result and only one of them is shown to have been present, it may be concluded by the jury that the cause shown to have been present at the time the result was produced is responsible for it.

2. NEGLIGENCE, § 204*—*propriety of verdict directed for defendant.* Where plaintiff seeks to hold an equipment company liable for alleged negligence in placing "kindall frames" so close to a railroad track as to be likely to be struck by a passing car, and the evidence clearly established that the frames as placed afforded sufficient room for all properly loaded cars in good order to safely clear the frames, and no evidence tended to show that the Equipment Company was chargeable with notice or knowledge that the car in question which struck the frames was so improperly loaded or permitted to project outward that it was liable to strike the frames, which were placed in such manner as not to fall unless violently struck by a defective car or other violent means, held that a peremptory instruction to find the Equipment Company not guilty for the wrongful death of its watchman while walking near the pile and a passing car was properly given by the court.

3. RAILROADS, § 695*—*sufficiency of declaration to support proof of improper loading of car.* Where a count attempts to charge a railroad company with negligence in having the car in question project outward, and the sufficiency of the charge is not challenged in the court below, an Appellate Court will hold it sufficient to support proof of negligence in permitting the car to so project outward and in operating the car in such condition.

4. RAILROADS, § 740*—*where question of negligence requires submission to jury.* In an action for wrongful death from being in-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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jured by falling frames when struck by a passing freight car which was found to be tightly loaded between its projecting sides, and the nuts or heads upon the bolts by which the iron pockets were presumed to be securely fastened to the body of the car were found to be drawn into the wood on the inside of the sill, whereby the pockets were enlarged and the stakes spread outward, and it appeared that cars of like width in good order had been hauled upon the same track without striking the frames as they were placed at the time of the accident, *held* the court erroneously directed a verdict in favor of the defendant Railroad Company.

5. RAILROADS, § 740*—*questions for jury*. Whether the sides of a freight car improperly project so as to strike a pile of frames alongside a railroad track and whether a railroad company is chargeable with knowledge that its sides so project are questions requiring submission to the jury under the evidence.

6. RAILROADS, § 516*—*duty towards persons near defective car moved on track*. Where the sides of a car improperly project prior to an accident, and the railroad company is chargeable with knowledge of such projection, the duty is imposed upon the railroad company to exercise reasonable care to see that the track upon which it moves the car is in a reasonably safe condition to permit such car to be moved thereon without injury to persons rightfully near such car.

7. RAILROADS, § 740*—*question of notice as to clear space for jury*. The question whether a railroad company is charged with notice of the clear space between a pile of frames and its track is one for the jury.

8. RAILROADS, § 762*—*where question of contributory negligence requires submission to jury*. In an action for the wrongful death of a watchman injured by frames falling when struck by a passing freight car, whether deceased was in the exercise of due care for his own safety is one of fact requiring submission to the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Michael Morrison, Appellee, v. The Peoples Gas Light
& Coke Company, Appellant.**

Gen. No. 19,271. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. HUGO PAM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed with finding of fact. Opinion filed February 3, 1915. Rehearing denied February 18, 1915.

Statement of the Case.

Action by Michael Morrison against The Peoples Gas Light & Coke Company to recover for personal injuries. From a judgment in favor of plaintiff for twenty-seven hundred and fifty dollars, defendant appeals.

The declaration alleged that plaintiff was a laborer working in a ditch nine feet deep and three feet wide; that boards were placed on each side of said ditch for the purpose of supporting the walls thereof, which boards were driven into the earth at the bottom of said ditch by means of mauls; that it was the duty of defendant to exercise reasonable care to furnish plaintiff and the other workmen there mauls that were in a reasonably safe condition and repair; that defendant negligently furnished the workmen driving said boards with an unsafe maul, in that the head of said maul was insecurely fastened to the handle thereof, and was liable to slip from said handle; that defendant knew that said maul was unsafe and in a bad condition of repair; that while plaintiff was working in said ditch and while a colaborer of plaintiff was driving one of said boards into the earth with said maul, the head of said maul slipped from the handle thereof and fell into said ditch striking plaintiff on the head; that said colaborer of plaintiff was without negligence. At about nine o'clock in the forenoon of April 13, 1910, plaintiff, who was employed as a ditch digger, had prepared the ditch for boards to be driven into the ground for the purpose

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of preventing the sides from caving in. Higgins, a gang foreman, directed McEwen to take a wooden maul, which was then lying on the earth bank, and drive the boards down. In response to such direction McEwen took the maul and drove the boards down while plaintiff, stationed in the bottom of the ditch, held the boards in an upright position. After McEwen had been so engaged in driving down the boards for fifteen or twenty minutes, and while he was swinging the maul, the head of the maul slipped or came off the handle and struck plaintiff on the head, causing injuries complained of. Plaintiff had no occasion or opportunity to inspect the maul, and while McEwen had not inspected it carefully, the head of the maul appeared to him to be tight upon the handle. During the forenoon of the day preceding the injury to plaintiff, the same maul had been used for the same purpose by Connors, another laborer, and while he was then so using it the head had come off the handle and fallen in the bottom of the ditch. Higgins, the foreman, then told Currey, who was employed by defendant as a laborer and repair man, to replace the handle in the head of the maul, and Currey then did so replace the handle and drove a wedge in the end of the handle to keep it firmly in place in the head of the maul, the same maul was thereafter during the remainder of that day used in driving boards into the bottom of the ditch. The maul was examined by Higgins the following morning and the head was found by him to be properly fastened to the handle and held in place by a wedge driven into the end of the handle.

SEARS, MEAGHER & WHITNEY, for appellant; JAMES F. MEAGHER and EDWIN HEDRICK, JR., of counsel.

DAVID K. TONE and H. M. ASHTON, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 132*—*simplicity of tool as relieving from duty to inspect.* A maul for driving boards into the earth is a simple tool so that no duty is imposed upon the master to inspect it for defects.

2. MASTER AND SERVANT, § 132*—*sufficiency of repair and inspection of tool.* Evidence held not only to negative any knowledge on the part of the master that a maul used for driving boards was defective and unsafe when direction was given to use it, but affirmatively to show that the maul had been recently repaired and that the master had every reason to believe it to be in a reasonably safe condition for use.

Herman Ulrich by Augusta Ulrich, Appellee, v. Knickerbocker Ice Company, Appellant.

Gen. No. 19,313. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed with finding of fact. Opinion filed February 3, 1915.

Statement of the Case.

Action by Herman Ulrich, a minor, by his next friend, Augusta Ulrich, against Knickerbocker Ice Company, a corporation, to recover for personal injuries. From a judgment for twenty-two hundred and fifty dollars against defendant in favor of plaintiff, defendant appeals.

The declaration alleged that on December 1, 1909, plaintiff, aged fourteen years, was lawfully walking upon and along Archer avenue, near its intersection with Blake street; that the defendant was then and there possessed of an ice wagon and of horses drawing the same, which were then and there under the care

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of certain servants of the defendant who were then and there driving the same upon and along said Archer avenue near its intersection with said Blake street; that it became and was the duty of the defendant by its said servants to drive, manage and control the said horses so attached to said ice wagon with reasonable care, along and upon said street, and not wantonly, maliciously and wilfully strike at persons who might then be walking upon said street, yet the defendant did not regard its duty in that behalf, but on the contrary thereof, by its said servants, wantonly, maliciously and wilfully struck at the plaintiff, who was then lawfully upon said street with all due care and caution for his own safety, with the whip, then and there in the hands of the servant of the defendant, causing the plaintiff in his endeavor to escape the said blow so directed at him to jump out of the reach of the said whip, and in so doing the rope which was attached to the plaintiff's arm caught in the wheel of the defendant's wagon, throwing the plaintiff down to and upon the ground there, dragging him along said street so that he sustained severe internal and external injuries, etc.

The evidence introduced on behalf of plaintiff showed that plaintiff was then about fourteen years and two months of age. While returning from an errand on which he had been sent by his mother in company with his cousin, who was then about nine years and ten months old, they had crossed the street car tracks in Archer avenue, in a southerly direction, and plaintiff was standing about midway between the south or east-bound track and the south curb swinging a lasso over his head preparatory to throwing it at his cousin, who was then some eight or nine feet ahead of him, the lasso being tied about plaintiff's left wrist. The defendant's ice wagon was coming from the south towards them and when it reached the place where the

boys were the driver of the team, who was sitting on the side nearest the boys, cursed the boys and struck the plaintiff over the back with a whip, causing the plaintiff in his sudden fright to let go of the lasso which he had been swinging over his head and causing it to fly onto the hub of the right hind wheel of the defendant's wagon. As the wagon went on it wound the lasso around the hub, drawing the plaintiff up into the wheel, breaking the plaintiff's arm in several places. There was no pretense that the plaintiff was, at the time in question, attempting to get upon the wagon or that he was obstructing or attempting to obstruct or interfere with its movement, or that defendant's servant struck the plaintiff for the purpose of preventing the latter from doing any like act, or in retaliation of anything the plaintiff had done or had threatened or purposed to do.

QUIN O'BRIEN and O. A. ARNSTON, for appellant;
JOHN P. MCKINLEY, of counsel.

JOSEPH A. WEBER, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 846*—*when an act not within the scope of employment.* Where a servant commits an act which causes injury to another, the master is not liable if the servant in causing the injury, is not acting within the general scope of his employment, and while engaged in his master's business with a view to the furtherance of that business.

2. MASTER AND SERVANT, § 846*—*acts not within the scope of employment.* Where a driver of a wagon for his master struck a boy across the back with his whip, while the latter was playing with another boy with a rope as a lasso, no attempt being made to interfere with the driver or the movement of his wagon, *held* to be an act not within the scope of the servant's employment such as to permit recovery for damages for injuries received as against the master.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Carpenter v. Norlander, 191 Ill. App. 340.

William H. Carpenter, Appellee, v. Charles S. Norlander, Appellant.

Gen. No. 20,618. (Not to be reported in full.)

Interlocutory appeal from the Circuit Court of Cook county; the Hon. JOHN P. MCGOOSKY, Judge, presiding. Heard in the Branch Appellate Court. Reversed. Opinion filed February 3, 1915.

Statement of the Case.

Bill by William H. Carpenter against Charles S. Norlander to restrain the interference with the use of a water supply from a certain tank and windmill. From an interlocutory order overruling defendant's motion to dissolve a temporary injunction restraining defendant from further depriving complainant of the water supply and from continuing to divert the same from a tank installed and connected with said windmill, defendant appeals.

The material averments of the bill were that complainant is the owner of a certain farm, which, on December 6, 1911, by a written lease, he demised to defendant for the term of three years from March 1, 1912; that said lease contains a reservation to complainant as follows: "Said Carpenter hereby reserves the house now occupied by him and family with front and back yards with convenient room for access to and from and about the same, also reserves the barn known as the North Barn on said premises with convenient room for access and use of same, also reserves the orchard nursery on said farm and included access * * * "; that defendant went into the occupancy of said premises, under said lease, and now occupies the same; that the back yard mentioned in said reservation clause in said lease is located behind the house back to a tight board fence which separates said back yard from the premises leased to defend-

ant; that at the time said lease was executed there was a circular tank ten feet in diameter so placed as to be convenient for use as a watering place for stock kept in either of the barns on said premises and for general farm purposes; that about one half of said tank was and is located upon the portion of said farm reserved by complainant and the other half of said tank was and is located upon the portion of the farm leased to defendant; that about one-half of said tank is on either side of said tight board fence and said tank was and is supplied with water from a windmill standing on the portion of the farm leased to and occupied by defendant. The bill further alleges that by the terms and provisions set forth in said lease that said water supply, as so furnished by said windmill and tank at the time of the execution of said lease, was reserved by complainant; that at the time of and in connection with the execution of said lease, the matter of said water supply, as then furnished by said windmill and tank, was discussed by the parties thereto, and it was then specifically stated by complainant and defendant that said water supply was included in the reservations set forth in said lease and should be so considered by and between said parties; that defendant then stated, in connection with the execution of said lease, that said reservations set forth therein should be so construed as to assure to complainant the undisputed right to said water supply during the term of said lease, and under said interpretation of the provisions of said lease, complainant, relying upon the same, delivered possession of said premises to defendant; that both of said parties did so use said water supply from said tank for all the purposes aforesaid without dispute or question until March 1, 1913, when defendant refused to allow complainant to use the same, and has resisted complainant's attempts to use the same for his stock and other purposes; that complainant has no other water supply on said premises from which he can furnish water for his stock and household, and

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that complainant has about six head of cattle and six head of horses on the portion of the premises reserved to him by said lease; that unless defendant is restrained from further depriving complainant of said water supply and use of the portion of the premises reserved by him, he will suffer irreparable injury at the hands of defendant; that defendant is insolvent.

CHARLES B. HAZELHURST and EDDY, WETTEN & PEGLER, for appellant.

L. H. GRANGE, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. EQUITY, § 247*—*necessity of amendment of supplemental bill on demurrer sustained*. Where a demurrer interposed by defendant to an original bill and supplemental bills is sustained and leave was given to file an amended bill, and an amendment was filed to the original bill, but no leave was asked or granted to amend the supplemental bill, the supplemental bill ceases to be a part of the case for review.

2. LANDLORD AND TENANT, § 155*—*rule as to exceptions and reservations*. Exceptions or reservations embodied in a leasehold contract for the benefit of the lessor will, in the case of doubt or ambiguity, be construed least favorable to the party claiming the benefit of the exceptions or reservations.

3. INJUNCTION, § 192*—*insufficiency of bill to show property rights in lessor*. Where it was contended that a windmill, pump and well on the portion of premises leased to defendant, together with the tank, which was in part upon the portion of the premises reserved to complainant, were fixtures running with the land, and the bill does not set forth the manner in which or means whereby the water was carried from the pump to the tank, or how the pipe, if it be such, carrying the water was connected or fixed to the pump and tank, there are not enough specific allegations to determine whether or not such instrumentalities are fixtures.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Newman v. Newman Clock Co., 191 Ill. App. 343.

4. LANDLORD AND TENANT, § 84*—*inadmissibility of parol evidence to aid construction.* Where a bill to restrain the interference with a certain water supply reserved to the complainant in a lease predicates a right to relief upon an alleged oral agreement entered into between the lessor and lessee contemporaneous with the written contract under seal, it is inadmissible to vary the terms of the written contract, as the leasehold contract cannot rest partly in writing and partly in parol.

5. LANDLORD AND TENANT, § 84*—*when the doctrine of practical construction may be invoked.* In an action to restrain a lessee from interference with lessor's water supply alleged to be reserved in a lease, the doctrine of practical construction may only be properly resorted to when the terms of the contract are uncertain and ambiguous.

**Albert A. Newman, Defendant in Error, v. Newman
Clock Company, Plaintiff in Error.**

Gen. No. 19,193. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed. Opinion filed February 3, 1915. Rehearing denied February 18, 1915.

Statement of the Case.

Action by Albert A. Newman against Newman Clock Company, a corporation, to recover monthly installments of salary due under a written contract of employment. From a judgment on a directed verdict in favor of plaintiff for seven hundred and fifty dollars, defendant brings error.

AMOS W. MARSTON, for plaintiff in error.

ELMER E. JACKSON and NEWMAN, LEVINSON, BECKER & CLEVELAND, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lynch v. Eifler et al., 191 Ill. App. 344.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 294***—*performance as condition precedent to recovery on.* Where a plaintiff causes the record to show that he elects to stand by his amended and supplemental bill and permits the same to be dismissed for want of jurisdiction at his costs and appeals on the record to reverse the order appealed from, it constitutes such a breach of his covenant to "forthwith discontinue" all suits against defendant as to preclude his recovery for salary on a written contract of employment containing such covenant for discontinuance of all suits.

2. **CONTRACTS, § 294***—*sufficiency of performance to assert rights.* Where under a written contract of employment it is agreed that all suits brought by plaintiff against a defendant corporation and its directors, or any of them, and by defendant corporation against said plaintiff shall be forthwith discontinued without costs to either party as against the other, plaintiff will not be heard to say that his appeal from an order of the Federal courts was to permit a proper adjudication as to the disposition of funds in the hands of a receiver, in an action by him to recover unpaid instalments of his salary.

B. A. Lynch, Plaintiff in Error, v. Charles Eifler and Bertha Eifler, Defendants in Error.

Gen. No. 19,229. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed and judgment here. Opinion filed February 3, 1915.

Statement of the Case.

Action by B. A. Lynch against Charles Eifler and Bertha Eifler to recover balance due on contract for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the sale of real estate on instalments. From a judgment in favor of defendants, plaintiff brings error.

Charles and Bertha Eifler entered into a contract on April 17, 1909, with Mary and Emil Marshall, whereby they agreed to pay to the said Marshalls the sum of \$1,500 in instalments and assumed and agreed to pay a certain mortgage for \$2,200 on certain premises described in the contract, and the Marshalls agreed that when all of the said instalments were paid they would convey to the Eiflers the premises in fee, subject to the mortgage. The premises had been occupied by the Marshalls for several years as their home. Upon the execution of the contract the Marshalls surrendered to the Eiflers the possession of the premises and they were still in possession when this action was instituted. The contract was filed for record on December 18, 1911. On May 3, 1910, the Brand Brewing Company obtained a judgment by confession in the Circuit Court of Cook county against the Marshalls for \$617.12 and costs. An execution was issued on the judgment and returned unsatisfied. On August 16, 1912, an *alias* execution was issued and was levied on the premises in question, and on September 17, 1912, the said premises were sold under this execution to the Brand Brewing Company and that company held the certificate of sale at the time this action was commenced. On May 18, 1911, the Marshalls borrowed of Mary H. Fox the sum of \$250 and assigned to her their interest in the contract above mentioned as security for the loan. On April 17, 1912, Mary H. Fox assigned to B. A. Lynch the said contract, and three days later she brought suit against the Eiflers to recover the amount then due on said contract, which was admitted to be \$346.50.

EMERY S. WALKER and WALTER E. MOSS, for plaintiff in error.

MAX BORCHARDT, for defendants in error.

United States v. L. L. Leach & Son, 191 Ill. App. 346.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. VENDOR AND PURCHASER, § 306*—*when judgment against vendor no defense to action for purchase price.* Where real estate is sold on instalments to one who goes into possession and a judgment is subsequently obtained against the vendor, the vendee cannot set up a sale of the vendor's interest in the premises under an execution on the judgment as a defense to a suit for unpaid instalments instituted upon an assignment subsequent to the rendition of the judgment, since the vendor had no interest in the property to which a lien could attach.

2. JUDGMENT, § 553*—*effect of judgment as to vendor's interest in property sold on instalments.* Where a purchaser of real estate goes into possession, a subsequent judgment against the vendor constitutes no lien on the title or interest remaining in such vendor by reason of unpaid instalments.

United States of America for use of J. G. McCarthy Company, Appellee, v. L. L. Leach & Son et al., on appeal of The United States Fidelity & Guaranty Company, Appellant.

Gen. No. 19,287.

1. PAYMENT, § 6*—*effect of taking note on original debt.* The giving and acceptance of a promissory note for and upon the settlement of a previously existing past due indebtedness is prima facie evidence of the satisfaction and extinguishment of such indebtedness, so that no recovery can be had on the original account or debt without an affirmative showing that the note was not intended as a payment, satisfaction or extinguishment of the old debt.

2. PAYMENT, § 6*—*effect of failure to surrender note on original debt.* The fact that an unpaid note given for an original indebtedness was not surrendered before suit tends to show that it and not the original debt was considered the basis of liability.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. PAYMENT, § 6*—*effect of giving note to preclude action on original debt.* In an action in debt upon a bond given by a contractor and his surety in compliance with an Act of Congress for the protection of persons furnishing material and labor for the construction of public works, held as an ultimate fact that certain notes given by the contractor to the subcontractor were given and accepted in full settlement, satisfaction and payment of the original debt such as to preclude recovery on the obligation.

Appeal from the Circuit Court of Cook county; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed with finding of fact. Opinion filed February 3, 1915.

JUDAH, WILLARD, WOLF & REICHMANN, for appellant.

EDWARD H. MORRIS, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

L. L. Leach & Son, an Illinois corporation, on July 14, 1900, entered into a contract with the United States Government to construct certain buildings in Washington, D. C., for which they were to receive \$76,000. On July 21, 1900, it gave a bond in the sum of \$38,000, in compliance with the provisions of an Act of Congress then in force, approved August 13, 1894, entitled, "An Act for the protection of persons furnishing material and labor for the construction of public works," with appellant, the United States Fidelity and Guaranty Company, as surety, and conditioned in part that it, the said L. L. Leach & Son, should "promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by the contract," which said bond was then duly approved. Leach & Son were to be paid for the work as it progressed, amounts aggregating ninety per cent. of the agreed total amount. The other ten per cent. of such amount was to be paid upon the completion and

*See Illinois Notes and Cases, Vol. XV, and Cumulative Quarterly, same topic and section as above.

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acceptance thereof. The J. G. McCarthy Company, also a corporation, did the painting and glazing for the structure and furnished the materials used in so doing, under a subcontract entered into between it and Leach & Son. For the part of the work and materials furnished by McCarthy Company, Leach & Son agreed to pay to it the sum of \$1,967. Eighty-five per cent. of the value of the materials so furnished and of the labor performed was to be paid for from time to time, and at such time or times as Leach & Son should receive from the United States its payments under the original contract, the remaining fifteen per cent. thereof to be paid when all the materials and labor contracted for had been furnished and completed to the satisfaction of the supervising architect or person in charge of the work for the United States. The work under the McCarthy contract was by its terms to be completed on or before December 20, 1900. The entire contract of Leach & Son was to be completed by January 21, 1901. McCarthy Company performed its contract within the specified time and in due time Leach & Son completed its original or main contract and was paid therefor in full by the Government. Leach & Son and McCarthy Company had other business transactions during and after the time the work was being done under the contracts in question, and entirely disconnected therewith. Money was loaned by the McCarthy Company to Leach & Son from time to time and money was paid by Leach & Son to the McCarthy Company. On October 8, 1901, almost ten months after the work done by McCarthy Company was completed, and almost nine months after the entire contract was completed and after Leach & Son had received its pay from the Government therefor, two notes were given by Leach & Son to McCarthy Company, aggregating \$3,321.21. This was the total amount then due from Leach & Son to McCarthy Company on all accounts. One of these notes for \$1,660.60 was due in six months from date and the other was for

\$1,660.61 and was due in one year from the date thereof. Each note drew five per cent. annual interest. The first one of these notes to become due included \$301.37 of the amount due on the McCarthy contract, and the note last due included \$979.46 of the amount so due thereon, a total of \$1,280.83. The six months' note was paid at maturity. Afterwards Leach & Son became insolvent and the note due in one year was not paid at maturity and had not been paid when this suit was begun, which was on May 1, 1906, five and one-half years after McCarthy Company was entitled to its money under the contract sued on. This suit is in debt on the bond. The jury found the issues for the plaintiff, found the debt to be \$38,000 and assessed the plaintiff's damages at the sum of \$1,342.68. Upon this verdict judgment was entered.

Appellant makes the point that the notes given on October 8, 1901, were given and accepted in full payment of all amounts due appellee from Leach & Son, including the balance due under the contract in question here, and that appellant was thereby discharged from all liability to appellee on the bond sued on. Appellee does not deny that if the notes were so given and accepted in discharge and payment of the original obligation secured by the bond then appellant was discharged from liability thereon, but insists that the verdict, which amounts to a finding that they were not so given and accepted, is amply supported by the evidence and should not be set aside. In this connection, our attention is called to the fact that L. L. Leach, the president of Leach & Son, testified that the notes were given as an "evidence of indebtedness," "to show, that is, what was due on each job." "To straighten up the account on different jobs." "Well they were not given as payment," and when asked: "When you gave these two notes were they not given in full settlement of the balance that was due from L. L. Leach & Son to J. G. McCarthy Company"? Answered, "No," and

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when asked at another time, "Weren't they given in full settlement"? Answered, "Well you might call it." And that Justin G. McCarthy testified that the notes were placed on the books of McCarthy Company as bills receivable and not as a cash credit. In weighing this testimony it should be borne in mind that it was given in December, 1912, while the transaction to which it relates took place October 8, 1901. More than eleven years intervened between the occurrences testified about and the trial. It is also worthy of note that both of these witnesses while they were testifying were interested in having appellant held liable on its bond. McCarthy was interested in collecting the unpaid balance and Leach was interested in having an honest obligation of Leach & Son collected from a corporate surety that had been paid to assume the liability. The testimony of Justin G. McCarthy was at the most but a conclusion from what appears on the books and is worthless as evidence. He testified: "I don't know what they (the notes) were given for." "I have no personal knowledge about it." "I am taking the book's word for it."

It is often true that facts existing, things done and circumstances surrounding the parties at the time of a transaction and connected therewith, the existence of which no one disputes, are of more probative force than the testimony of witnesses given at a time, long after the transaction is closed, when the particulars of it may well have been forgotten, or the interest of the witnesses may be a hindrance to frankness. Particularly is that true when the thing to be determined is the intent with which a given act was performed. There are in this case a number of uncontroverted facts that tend most forcibly to prove that the notes in question were intended as a payment of the debt.

First. The notes were given for an amount found due upon the settlement of existing past due accounts.

It has long been the settled law of this State that the giving and acceptance of a promissory note for and upon the settlement of a previously existing past due indebtedness is prima facie evidence of the satisfaction and extinguishment of such indebtedness and that no recovery can be had on the original account or debt without affirmatively showing that the note was not intended as a payment, satisfaction or extinguishment of the old debt. *McConnell v. Stettinius*, 7 Ill. 707, 713; *Ralston v. Wood*, 15 Ill. 159, 171, 172; *Smalley v. Edey*, 19 Ill. 207-211; *White v. Jones*, 38 Ill. 160-165; *Morrison v. Smith*, 81 Ill. 221, 223, 224.

Second. The debt was due January 21, 1901. The notes were given and accepted October 8, 1901. The first note to mature was due and was paid April 8, 1902. Before the maturity of the second note Leach & Son were hopelessly insolvent, as McCarthy Company well knew, and the note was not paid, yet no claim or demand on appellant was made for this debt and no notice, constructive or direct, of its existence was given appellant, until May, June or July, 1905, and no suit was begun to recover on it from appellant until May, 1906, five and one-half years after the debt was due, although other claims of appellee against appellant on like bonds given after this debt was due, to the amount of \$7,000, were in the meantime adjusted and paid. The insolvency of Leach & Son furnished ample reason why appellee would naturally apply promptly to appellant for the payment of this debt, if it was believed a valid liability therefor existed. These circumstances without explanation are in accord with the theory, and strongly tend to show that it was mutually understood between appellee and Leach & Son that the original debt was paid and extinguished and merged in the notes.

Third. The explanation made in 1905 by J. G. McCarthy, Sr., who was president of the McCarthy Company when the debt became due and when the notes

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were accepted, of why claim was finally at that late date made by his company against appellant for this debt was that, while he did not consider his company had any claim it was entitled to enforce against appellant for this debt, his son, Justin, who had been attending law school, believed it had. When this explanation is considered in the light of the facts that McCarthy, Sr., knew all about and participated in the transaction when it took place, and knew that appellant was originally liable for this debt, and that McCarthy, Jr., knew nothing about it except what he got from the books, the conclusion is irresistible that McCarthy, Sr., understood that the liability of appellant had been extinguished by the giving of the notes.

Fourth. The books of McCarthy Company show that the account in question was balanced by the notes, and the books of Leach & Son contain the following memoranda with reference to the unpaid note: "Our note given them for twelve months after date, due October 8, 1902, in full settlement of contract for painting, glazing, etc., of the northwest extension of the Bureau of Engraving & Printing."

Fifth. The rule adhered to in the Federal courts is that where a note is taken as mere evidence of a debt and is dishonored, the creditor, if he desires to sue on the original indebtedness, must surrender the note, but that the action on the original debt is in the meantime suspended. *Harris v. Johnston*, 3 Cranch (U. S.) 317; *The Kimball*, 3 Wall. (U. S.) 37; *Looney v. District of Columbia*, 113 U. S. 261; *Segrist v. Crabtree*, 131 U. S. 287. The fact that the unpaid note was not surrendered before suit tends to show that it and not the original debt was considered to be the basis of liability.

To our minds the testimony of Leach, uncorroborated by any fact, circumstance or witness, and contradicted by the recitals in the books of his own company, as well as by the books of McCarthy Company, falls far short of overcoming the legal presumption arising

from the giving of the notes, corroborated as that presumption is by the facts and circumstances hereinbefore recited. From a careful consideration of all the evidence in this record, we are forced to the conclusion that by a great preponderance of that evidence it is established that the notes were taken and accepted as a payment of the indebtedness included therein, and that in so far as the verdict of the jury amounts to a finding that the same were not so taken, it is against the manifest weight of the evidence.

The judgment of the Circuit Court is therefore reversed with a finding of fact to be incorporated in the judgment of this court.

Judgment reversed with finding of fact.

Finding of fact.—We find as an ultimate fact that when the notes in question were given by L. L. Leach & Son and accepted by J. G. McCarthy Company they were given and accepted in full settlement, satisfaction and payment of the indebtedness sued for in this case.

Charles F. Ross, Appellant, v. New South Farm & Home Company, Appellee.

Gen. No. 19,304.

1. **APPEAL AND ERROR, § 1078***—*necessity of cross-error to appellee's right to review.* Where appellant has assigned all errors necessary to the review of all findings and rulings adverse to him and no cross-errors have been assigned, the findings of fact must, as against appellee be considered to be supported by the evidence.

2. **CORPORATIONS, § 748***—*when want of license not a defense.* In an action to recover a commission for securing a loan, the fact that defendant is a foreign corporation and has not complied with Hurd's R. S., ch. 32, sec. 67c (J. & A. ¶ 2527) does not constitute a defense, since it is not primarily unlawful to contract for a commission to secure a loan.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. CORPORATIONS, § 748*—*enforceability of unlawful contract against foreign corporation.* While contracts made in violation of Hurd's R. S., ch. 32, sec. 67c (J. & A. ¶ 2527) are not enforceable at the instance of the corporation, they are enforceable against the corporation unless they are unlawful in themselves.

4. BROKERS, § 4*—*construction of requirement of license as to isolated acts.* An ordinance making it unlawful for one to engage in the business or act in the capacity of a broker, within the city, without first obtaining a license, applies only to persons engaged in the business of brokerage as an occupation or vocation and not to those who have participated in isolated acts.

5. BROKERS, § 28*—*what constitutes an unlicensed broker.* In an action to recover a commission for securing a loan, held as an ultimate fact that plaintiff was not at the time of the transaction involved a broker or acting in the capacity of a broker within the meaning of sections 192 to 198 of chapter XV of the Ordinances of the City of Chicago, making it unlawful for one to engage in the business or act in the capacity of a broker, within the city, without first obtaining a license.

Appeal from the Municipal Court of Chicago; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed with finding of fact and judgment here. Opinion filed February 3, 1915.

MILLER, STARR, PACKARD & PECKHAM, for appellant;
CHARLES L. COBB, of counsel.

W. A. BOWLES and FOREMAN, LEVIN & ROBERTSON, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Appellee is a Florida corporation owned chiefly, if not exclusively, and officered by three gentlemen respectively named Sieg, Leven and Strauss. This corporation dealt in Florida lands extensively, had large assets, substantial liabilities, and was in need of money. On February 7, 1911, Leven, on behalf of the corporation, told its needs to one Clyde A. Mann, and told him if he would put the corporation in touch with some one

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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from whom it could borrow \$50,000 or \$100,000, it would give to Mann ten per cent. on the amount borrowed as his commissions. Mann told Leven he thought the loan could be secured and asked him to put his offer in writing which was done. This written proposal was assigned by Mann to C. F. Ross. A loan of \$100,000 from the Assets Realization Company, sometimes called "Cobe and McKinnon" was soon negotiated. Thereafter, but before the money was paid over, Ross asked Sieg and Strauss for a written confirmation to him of the agreement made between Leven and Mann, which had been so assigned to him. In response to that request the following writing was executed by appellee and delivered to Ross:

"NEW SOUTH FARM AND HOME COMPANY
Merchants Loan & Trust Building,
Chicago,
March 1, 1911.

Mr. Chas. F. Ross,
339-341 Rand McNally Bldg.,
Chicago, Ills.

Dear Sir:

We hereby confirm the arrangement made by Mr. Ben Leven of date February 7th, 1911, whereby we are to pay you 10% commission on all moneys received by us from Cobe and McKinnon or from others which you are instrumental in getting for us. Said commission is to be paid in cash when any deal is consummated.

Yours truly,
NEW SOUTH FARM & HOME COMPANY,
CHAS. H. SIEG,
President."

Soon thereafter the Assets Realization Company began to pay over to appellee the funds negotiated for, and appellee began paying to appellant instalments on his commissions. In that way appellant received from appellee \$1,000 on March 10, 1911, \$1,000 on March 13, 1911, and \$1,000 on March 15, 1911. Further payments were refused by appellee and this suit was brought to

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recover \$7,000, as the unpaid balance of commissions due Ross for being instrumental in getting the loan. The court before whom the case was tried without a jury held the following facts, among others, to be established by the evidence: That the contract between the parties for procuring a loan was repeatedly ratified and acknowledged by appellee; that appellee continued throughout the transaction to request and encourage appellant to continue his efforts to procure the loan with full knowledge of his claim for commissions, and that it was estopped to deny the contract; that appellant was instrumental and the procuring cause in securing the loan of \$100,000 for appellee; that appellant did not procure the contract by fraud, circumvention or false representations; that in rendering the services he did render in securing this loan appellant was engaged in the business and was acting in the capacity of a broker in the city of Chicago, and had not complied with the ordinances of the city regulating brokers; that appellee is a foreign corporation not duly licensed to do business in this State and not entitled to do business here without a license; that the business here involved was transacted in the city of Chicago and in the State of Illinois.

The court then found the issues for the defendant (appellee here) and rendered judgment against the plaintiff (appellant here) for costs.

Appellant had assigned all errors necessary to the review of all findings and rulings adverse to him. No cross-errors have been assigned. The findings of fact must, therefore, as against appellee, be considered to be supported by the evidence.

During the trial a motion of appellant to strike from the files that paragraph of appellee's affidavit of defense which set up the defense that it was a foreign corporation not licensed to do business in this State was reserved to the end of the case and was then allowed. No cross-error has been assigned by appellee to that action of the court and the correctness of that

ruling is, therefore, not here for review. However, as counsel on both sides have argued at length the question whether a foreign corporation of a character requiring a license in this State before it is authorized to do business here, and not so licensed, can avail itself of that fact to defeat its own contract, we have given it consideration.

Section 67c, ch. 32, Hurd's R. S. (J. & A. ¶ 2527), which prohibits foreign corporations of certain kinds from doing business in this State without being first licensed by the Secretary of State, was enacted for the protection of persons dealing with such corporation and not for the protection of the corporation against those with whom it deals. No foreign corporation is bound to comply with that statute. It may refrain from so doing and be safe, provided it at the same time refrains from transacting business and exercising its corporate powers here. If it undertakes to transact business or exercise its corporate powers in this State without complying with this statute, it does so at its own risk. It is presumed to know the law, and it necessarily knows the fact whether it has complied with the law or not, for to comply with the law requires affirmative action on the part of its officers. Those with whom it deals, while also presumed to know the law, may not and usually do not know and are not able to find out whether it has complied with the law without very considerable trouble and delay and some expense. To exact the same penalty from one who acts in ignorance of whether those with whom he is doing business have complied with the law, and are, therefore, entitled to transact the business in hand and who relies and has the right to rely on the presumption that every man will comply with the requirements of law and act honestly, as is exacted from him who knowingly acts in violation of law, would manifestly not be dealing out even-handed justice, even in cases where the transaction entered into is unlawful in itself. We think

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no respectable authority can be found which, when rightly understood, can be construed to announce the law to be that in cases where the transaction is not in itself unlawful, the party who knowingly acts in violation of law can use such acts as a shield or defense when called upon by the innocent to perform its part of the transaction so entered into. Contracts made in violation of the section of the statute above referred to are not enforceable at the instance of the corporation, but unless they are unlawful in themselves they are enforceable against the corporation. It was not primarily unlawful for appellee to contract for a loan or to contract with appellant to aid them in securing a loan and to pay him a commission for so doing. The fact that appellee was a foreign corporation and had not complied with the provisions of section 67c of chapter 32, Hurd's Revised Statutes, constitutes no defense to appellant's claim in this case. *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85, adopting the opinion in the same case found in 40 Ill. App. 119; *Rockhold v. Canton Masonic Mut. Benevolent Society*, 129 Ill. 440; *McCartney v. Supreme Tent*, 132 Ill. App. 15; Thompson on Corporations, vol. 5, sec. 6711.

What we regard as the controlling question presented by this appeal is whether appellant, while performing the services in which he claims to have earned the commissions sued for, came within the provisions of section 192 to 196 inclusive of chapter XV of the Ordinances of the City of Chicago. Section 192 provides that: "It shall be unlawful for any person or corporation to engage in the business or act in the capacity of a broker, within the City, without first obtaining a license therefor." Section 194 defines a broker as "one who is engaged for others in negotiating contracts relative to property with the custody of which he has no concern." Section 195 defines a real estate broker to be "one who is engaged for others in negotiating contracts relative to real estate."

In the case of *O'Neill v. Sinclair*, 153 Ill. 525, an ordinance, in substance the same as the one now in force, with the words "or in the capacity of" omitted, was construed. That court held that the negotiation of a single sale by a person who was not in the business of selling or negotiating sales of real estate did not constitute him a real estate broker within the meaning of the ordinance; that the term "real estate broker" applied solely to persons making sales or negotiation of sales of real estate as a business or occupation. The *O'Neill* case, *supra*, has been cited with approval in *Weinshenker v. Epstein*, 176 Ill. App. 104; *Jones v. Missouri Lumber & Mining Co.*, 166 Ill. App. 266; *Packer v. Sheppard*, 127 Ill. App. 598; *Lake v. Koutsogianis*, 174 Ill. App. 252, and in each of those cases, except the *Weinshenker* case, *supra*, as well as in *Crilly v. Young*, 152 Ill. App. 72, the plaintiff who was suing for commissions in a single transaction without having taken out a license as a broker was allowed to recover his commissions on the theory announced in the *O'Neill* case, *supra*, the evidence being held not to show that the party was engaged as a business in selling property for others or negotiating contracts relative thereto.

We are not prepared to hold, as was apparently done in the *Crilly* case, *supra*, that it necessarily requires more than one act of brokerage to bring one under the provisions of the ordinance in question. If one should rent and furnish an office and place on the doors and windows thereof signs announcing that he is in the brokerage business, spend his time in listing property for sale and customers for property, solicit business in his line and undertake to negotiate for others contracts relative to real estate, he would, we think, be a broker and be amenable to the ordinance referred to, even before, and certainly when, he had consummated the first deal. There is no mystery about this ordinance. It is plainly intended to reach those who are

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in the business of brokerage and no one else. Appellee insists that the words "or act in the capacity of a broker," added by an amendment to the ordinance, were so added for the purpose of prohibiting and do prohibit single acts, such as, if repeated, would constitute a brokerage business. Whatever reason there might be in that contention, if it were now a question for original construction, we do not consider it now to be an open question. In all the cases above cited, we think, with the exception of the *O'Neill* case, *supra*, the words "or act in the capacity of a broker" were included in the ordinances at the time the cases arose, yet the court either ignored the added words or treated them as surplusage and construed the ordinance to mean the same as it was construed in the *O'Neill* case. In all those cases, except the *Weinshenker* case, the plaintiff, who was not a licensed broker, and who was suing to recover for commissions earned in a single transaction, was allowed to recover. In *Banta v. City of Chicago*, 172 Ill. 204, this ordinance, containing the words in question, was construed to be "an ordinance declaring it unlawful for any person, association or corporation to engage in business in the capacity of a broker" and that it "levies a license fee upon each person pursuing the occupation of a broker," and was held valid, because the city has "ample power and authority to impose license fees upon the occupation of a broker * * *." All through that opinion the ordinance is treated as applying to persons engaged in the occupation or pursuing the vocation of a broker. No expression is there found that suggests even the possibility that the words referred to could be intended to apply to isolated acts of persons not so engaged. In view of the long and unbroken line of cases in which the rights of litigants have been determined by the courts of this State upon the theory that this ordinance as at present worded applies only to persons engaged in the business of brokerage as an occupation or voca-

tion and not to those who have participated in isolated acts, it would be the height of presumption for this court now to give to it a contrary meaning.

On the question of whether appellant at the time he rendered the services for which he claims commissions was engaged in the city of Chicago in the business of a broker as an occupation or vocation, there is no conflict in the evidence. It all comes either from the mouth or pen of appellant or from those who have testified of his acts. On the witness stand appellant told, apparently without reserve, of the various places where he had been employed or in business from his first start in a business life in Toronto, Canada, to the day of the trial, and what he did in those various places, although it is inconceivable how what he did, or where he was engaged in business at times and places both before and after the transaction here involved and at remote distances from the city of Chicago, can be of much aid in determining whether he was engaged in brokerage as a business, calling or vocation at the time in question. The list of the businesses in which he has been engaged includes banking in Toronto, Canada, from 1882 to 1896; brokerage at the same place about two years after he quit the banking business there; manager of trading stamp companies in Massachusetts and Connecticut; selling paving blocks in New York on commission; general agent on salary for Pacific Coast Borax Company at Boston, Mass., and Buffalo and Rochester, New York, up to about the time he came to Chicago, which was in June, 1909; an accountant, auditing the books of the Chicago Athletic Club; selling stock and promoting for the Consolidated Casualty Company up to March, 1910; "got out pamphlets and things like that" at Newton, Iowa, in connection with an issue of preferred stock in a corporation there; worked a "couple of months" in Southern Illinois for C. S. Kidder of Chicago, who was in the bond business; audited the books of the Lamont City Bank; went to

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Indiana and tested out a railroad safety device; and sold life insurance for Union Central Life Insurance Company. That was in January, 1911. It was while he was so last engaged that the contract between Leven and Mann on which this suit is based was turned over to him. On March 1, 1911, he introduced a Mr. Baldwin, connected with and who wanted a loan for the San Jose Lumber Company, to Mr. Ridgely of the Assets Realization Company. Between February 8th and March 10th he secured some money for Leven or the appellee from some person other than the Assets Company. This was the last transaction appellant was engaged in up to the time this suit was commenced. During his examination as a witness he was asked: "You found that the supposition prevalent, that you had procured this loan from the Assets Realization Company for the New South Farm & Home Company helped you in your business, did it not?" To this he answered, "No, I didn't have any business as a matter of fact."

A careful consideration of appellant's testimony must, it seems to us, convince any impartial mind that in truth he did not have any definite business which it can be said he was following as an occupation or employment, and that his last answer above quoted was literally correct. It further shows that he was a man who held himself ready and willing to pursue any line of endeavor where his personal efforts and ingenuity would be likely to be remunerated.

If his testimony is true, and it is uncontradicted and sounds reasonable, if he could be said to have any business at the time he undertook to render and when he rendered the services sued for, it was that of a life insurance agent, or, as it is sometimes called, selling life insurance. If it be a fact that his success in this transaction stimulated in him a determination to enter the business of a broker, and if in fact he did thereafter engage in that business, such facts could not be con-

sidered as relating back to and characterizing this transaction, the opportunity for which came about unsought. We think that the finding of the trial court that at the time of this transaction appellant was engaged in the business of a broker and that he was acting in the capacity of a broker is clearly in conflict with the evidence.

The contract sued on and its performance by appellant being established, judgment should have been entered in the Municipal Court for the \$10,000 agreed commission, less \$3,000 paid before suit was brought, together with interest on the unpaid balance of \$7,000 at five per cent. per annum from March 17, 1911, the date the contract was repudiated to the date of the judgment.

The judgment of the Municipal Court is, therefore, reversed with a finding of fact to be incorporated in the record of this court, and judgment here entered in favor of appellant and against appellee for \$8,357.21, which includes \$7,000, the unpaid part of the agreed commission stipulated for, and \$1,357.21, interest on \$7,000 at the rate of five per cent. per annum from March 17, 1911, when this debt was repudiated, to this date, and for costs in both courts.

Judgment reversed with finding of fact and judgment here.

Finding of fact.—We find as an ultimate fact that appellant was not at the time of the transaction here involved a broker or acting in the capacity of a broker within the meaning of sections 192 to 198 of Chapter XV of the Ordinances of the City of Chicago.

Burkey v. Chicago City Railway Co., 191 Ill. App. 364.

Oliver K. Burkey, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 19,323. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELON J. PETIT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed February 3, 1915.

Statement of the Case.

Action by Oliver K. Burkey against Chicago City Railway Company for personal injuries. From a judgment against defendant in favor of plaintiff, defendant appeals.

Plaintiff testified that he attempted to board defendant's street car, which had stopped on a signal to receive passengers, and that before he reached the platform, the car started with a violent jerk, throwing him partly on the platform and partly off, so that by the force of the motion he rolled off into the street, resulting in the fracture of a bone in one of his legs. In these particulars he was corroborated by an apparently disinterested eyewitness and by the undisputed fact that he suffered the fracture on the day in question.

He was also corroborated by the testimony of the conductor of a car which he says he boarded soon after the accident, who testified that he complained to him of having been thrown from a car and hurt about the time and place testified to by appellee, and also by a doctor who testified to being called to treat plaintiff and that he found the fracture complained of.

The conductor in charge of the car in question testified plaintiff did not attempt to board the car and was not thrown from the car at all. His testimony was in a way corroborated by the negative testimony of some other witnesses who were in a position in which

they might have seen the occurrence, if it had taken place, who say they did not see it occur. Plaintiff was contradicted by the testimony of the conductor to whom he complained and whom he asked to report the accident to the company, who testified that plaintiff then pointed out a different place in the street where he then said the accident happened and that he then made statements in conflict with his testimony as to how it happened. This plaintiff denied.

WATSON J. FERRY, for appellant; LEONARD A. BUSBY, WARNER H. ROBINSON & BENJAMIN F. RICHOLSON, of counsel.

HARPER E. OSBORN and ALBERT M. CROSS, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 113*—*irrelevancy of evidence*. In an action for personal injuries, testimony as to the manner in which plaintiff attempted to board the street car and the way in which he fell and where he went and what he did before and after the accident throw no light on the vital questions whether he was thrown from the car at all, and if so whether it was the result of the negligence of the street railroad company or of the passenger.

2. CARRIERS, § 476*—*sufficiency of evidence upon conflicting testimony to sustain verdict for personal injuries*. In an action to recover damages for personal injuries alleged to be due to plaintiff's being thrown from a street car by reason of its sudden starting up while he was attempting to board it, evidence held sufficient to support a verdict upon conflicting testimony and a judgment in favor of the plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fitzgerald v. Sampsell, 191 Ill. App. 366.

**Thomas Fitzgerald by Sarah Fitzgerald, Appellee, v.
Marshall E. Sampsell, Receiver, Appellant.**

Gen. No. 19,363. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. HARRY M. WAGGONER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 3, 1915. Rehearing denied February 18, 1915.

Statement of the Case.

Action by Thomas Fitzgerald, a minor, suing by Sarah Fitzgerald, his next friend, against Marshall E. Sampsell, as receiver of Chicago Union Traction Company, to recover for personal injuries. From a judgment for twenty-seven hundred and fifty dollars in favor of plaintiff, defendant appeals. While defendant's street car had stopped at an appropriate and customary place to discharge passenger, plaintiff, of the age of about six and one-half years, was thrown to the pavement, with his mother, who was assisting him to alight, because of the starting of the car at the conductor's signal.

The undisputed evidence of the father and mother of plaintiff and a nurse who attended him showed that he was bruised on the hip, groin and knee and for a long time was sore in those parts, and that he was confined to his bed the larger part of the time for a month or more; that the bruise on the knee became infected and did not heal for several weeks; that parts of his body near the bruise on the hip became black and blue and there was a swelling in the groin; that he from the moment of the injury has walked with a limp; that a year or more after the accident the mother of plaintiff claimed to have noticed a curvature of his spine and an apparent shortening of one of his legs, and that prior to the injury he was a sound, healthy boy. The evidence

tended to show that the neck of the right femur between the ball of the hip joint and the great trochanter was shorter than natural by a half inch, and that where the right femur connects with the pelvic bone that bone is higher than its counterpart on the left side of the body.

CHARLES L. MAHONY and WILLIAM H. SYMMES, for appellant; JOHN R. GUILLIAMS and FRANK L. KRIETE, for counsel.

MORSE IVES, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 404*—*liability for negligence in starting car.* Where a child of tender years was thrown from a street car to the pavement because of the starting of the car while he, with the assistance of his mother, was alighting therefrom and the car was started because of the negligent order of the conductor, *held* that the child was entitled to recover such damages as such starting of the car was the proximate cause.

2. CARRIERS, § 390*—*duty towards passenger alighting from street car.* Where there was no doubt as to the act of a street car conductor in causing the car to start while a passenger was attempting to alight therefrom being negligence under any view of the duty of the carrier to its passenger, an instruction that it was the duty of the carrier to exercise for the safety of its passengers the highest degree of care "consistent with the operation of the road," is *held* not to require a reversal, although erroneous, the rule being that such carrier must use the highest degree of care for the safety of its passengers consistent with the *practical* operation of the road.

3. CARRIERS, § 390*—*duty towards alighting passengers.* It is the duty of a carrier, when its street car has been stopped to permit passengers to alight therefrom, to see that the same is not started while such passengers are in the act of so alighting.

4. INSTRUCTIONS, § 52*—*effect of use of mandatory word.* An instruction regarding the elements the jury might take into con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Baldino v. Henneberry, 191 Ill. App. 368.

sideration in determining whether plaintiff had proved his case by a preponderance of the evidence, the use of the words "*should* take into consideration" is *held* not to be reversible error, although "*may*" or some equivalent should have been used instead of a mandatory word such as "*should*."

5. INSTRUCTIONS, § 41*—*province of jury as judges of facts*. An instruction informing the jury that they are, "under the instructions of the court and from the evidence," the sole judges of the facts is not faulty as making the jury "the sole judges of all questions of fact."

6. DAMAGES, § 110*—*where verdict not excessive for permanent injuries*. Where plaintiff, of tender years, from the time of an accident had walked with a limp and had a curvature of the spine and shortening of a leg, with other permanent injuries, while he had previously been a sound, healthy boy, a verdict for twenty-seven hundred and fifty dollars *held* not excessive.

**Dan Baldino, Defendant in Error, v. Rose Henneberry,
Plaintiff in Error.**

Gen. No. 19,545. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 4, 1915.

Statement of the Case.

Action by Dan Baldino against Rose Henneberry for a commission for procuring a purchaser for real estate. From a judgment against defendant for \$625 in favor of plaintiff, defendant brings error.

In 1910 defendant listed an apartment building and a cottage in Chicago with several real estate brokers, including the plaintiff, to sell and the price named was \$30,000. Plaintiff put the price on a card, placed the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

card among his office files, and submitted the property to several prospective purchasers, without result. In 1911 the cottage was sold by the defendant, and thereupon the price for the apartment building was reduced to \$26,000. This fact was communicated to the plaintiff and he noted it on the card in his office. The plaintiff testified that about that time, one Joe Viviano, a dealer in macaroni, living in Chicago, told the plaintiff he was looking for a building for his brother, Sam (or Salvatore) Viviano, who, at that time, lived in St. Louis, Missouri; that plaintiff and his salesman showed Joe Viviano several pieces of property, including that of the defendant, and that Joe Viviano then said he could do nothing until his brother came to Chicago. Joe Viviano testified that plaintiff showed him "many properties"; that he wanted "to buy me and my brother together a residence property" and that when plaintiff pointed out defendant's building to him, "I say it is not the house that we want—it don't suit us, this place." He denied that he acted as his brother's agent, and denied that he ever told plaintiff that such was the fact. Sam Viviano arrived in Chicago early in the year 1912. Plaintiff claims that he then called upon him and asked him whether his brother Joe had spoken to him about "that corner I showed him"; that on receiving a reply in the negative, the plaintiff made an appointment to show him the property, and that the next day he did "show" him the property, by driving him around in a buggy and pointing out three pieces of property, one of which was that of the defendant. The plaintiff also claims that on another occasion, in the summer of 1912, he walked with Sam Viviano to the defendant's property and again called his attention to it, from the sidewalk. He admitted that he never took either of the Vivianos inside the building, at any time. Nothing came of these efforts on the plaintiff's part to sell the property.

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The plaintiff did not report any of these facts to the defendant, and, apparently, nothing further was done by him towards effecting a sale to either of the Vivianos until after he learned that Sam Viviano had been induced by another broker, a woman named Mrs. Emily Badali, to examine the property, as hereinafter stated.

The defendant was out of the city from June, 1912, until October 7, 1912. In September, 1912, Mrs. Badali, who was acquainted with Mrs. Sam Viviano, was endeavoring to sell her some property on Congress street, and while returning from a visit to that property met one of the defendant's tenants on the street. In talking to him they learned that defendant's property was for sale. They went to the building and looked through one of the flats. The next day they sought the defendant's son, who took them through the building. A few days later, at Mrs. Badali's instance, both Mrs. Viviano and her husband examined the property. This was the first time he had seen the inside of the building, and soon after he made a further examination with the assistance of a contractor and plumber, whom he employed for that purpose. Some negotiations followed with the son of the defendant, and later, upon her return to the city, with the defendant in person, which resulted in the defendant's accepting an offer of \$25,000 made by Viviano. A written contract to that effect was prepared by Viviano's lawyer on October 12, 1912, but owing to some dispute about "pro-rating" taxes and other small matters it was not signed until October 15, 1912.

The plaintiff testified that on October 6th or 7th he called on the defendant and told her that he had a customer named Viviano, who would pay \$24,500 for the property, and that the defendant replied that she would not take less than \$25,000. He did not claim that he ever mentioned Viviano's name to the defendant prior to that time. The defendant and her daughter both testified that the defendant did not return to the city until October 7th; that the next day after she returned,

Sam Viviano and Mrs. Badali called at defendant's house, and again a day or two later, as above stated, and that it was not until after their second visit—which was on October 9th or 10th—that the plaintiff made the visit he claims he made on October 6th or 7th. On October 13, 1912, plaintiff wrote a letter to the defendant, saying that he had had “a long talk with Viviano Bros.”; that “he” had said “he” would not pay over \$25,000, and that the plaintiff had told “him” that defendant would not consider less than \$25,500; that “this property has been submitted to these people out of my office in the last year or so”; that “one of their brothers accompanied the man I had working for me at the time,” who “took them over and showed the property, but he did not take them through”; that “they were not taken through the building because you were away”; and that he understood from Viviano that “there is a girl between the deal.” The letter concludes by asking defendant to let him know “the lowest price on the property.” This letter was received by defendant after the contract had been prepared, but before it was signed. She gave the letter to her lawyer. After taking from Sam Viviano an affidavit as to the facts, the sale was consummated on October 24, 1912, and defendant paid a full commission to Mrs. Badali. Plaintiff based his action on the theory that he had found a purchaser who was accepted by the defendant.

JAMES S. DEMING and D. I. JARRETT, for plaintiff in error; THOMAS J. YOUNG, of counsel.

MILES J. DEVINE and JOHN T. MURRAY, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Neville v. City of Chicago, 191 Ill. App. 372.

Abstract of the Decision.

1. **BROKERS, § 29***—*compensation where several brokers.* Where an owner of real estate employs several real estate brokers to effect a sale of his property, the broker whose efforts actually bring about the sale is the one who is entitled to the commission for a sale, provided the owner acts in good faith.

2. **BROKERS, § 37***—*necessity of showing procuring cause of sale.* Where several brokers are employed to procure a purchaser for real estate and one of them brings an action for commissions, he not only must prove that he commenced negotiations with a party who subsequently purchased the property but, in order to recover, must also show by a preponderance of the evidence that he actually brought about a consummation of the sale, or was prevented from so doing by the fraud, procurement or misconduct or fault of the owner.

3. **BROKERS, § 90***—*evidence insufficient to show procuring cause of sale.* In an action for real estate commissions, evidence held insufficient to show that a broker "actually brought about a consummation of the sale."

4. **BROKERS, § 54***—*evidence held insufficient to show bad faith in owner.* Where a broker sought to recover commissions for effecting a sale of real estate, evidence held insufficient to show that the owner acted in bad faith in selling the property through another agent, such as to entitle each broker to a commission.

Mary Geraldine Neville, Plaintiff in Error, v. City of Chicago, Defendant in Error.

Gen. No. 19,704. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. CHARLES A. McDONALD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 4, 1915.

Statement of the Case.

Action by Mary Geraldine Neville against the city of Chicago for damages for injuries resulting from a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

fall on a defective sidewalk. From a judgment in favor of defendant, plaintiff brings error.

The essential facts are stated in a review of a former trial in the opinion filed in *Neville v. City of Chicago*, 154 Ill. App. 537. Upon the second trial, it was clearly shown that the sidewalk upon which the accident occurred was at that time old and worn, was affected by dry-rot and had been frequently repaired. While several witnesses called by defendant testified that they had never seen any holes in the sidewalk, all of them practically admitted that the walk was in the condition above stated. The manner in which the accident occurred was not disputed. The real dispute in the case arose upon the claim of the plaintiff that certain ailments that developed long after the accident were directly caused by the accident. Most of the evidence on this point was given by physicians. Some of the evidence of these physicians was opinion evidence, and some was as to matters of fact. The physician who attended the plaintiff at the time of the accident testified only as to the plaintiff's injuries at that time and his treatment for a week or two thereafter. At the defendant's request, the court gave to the jury the following instructions:

"The court instructs you that you are to judge of the credibility of doctors and experts the same as of the credibility of other witnesses. You are not bound to take as absolutely true the testimony of any doctor or expert, but you are authorized to consider the apparent consistency, fairness and congruity of such testimony; the probability or improbability of the same; the motive, temper, feeling or bias of the witness, if any, his interest or lack of interest, if any, in the result of the case; and to give such credit to such testimony as, under all the circumstances, you believe it to be entitled to, and no more."

A. W. FULTON and T. F. LARAMIE, for plaintiff in error.

Neville v. City of Chicago, 191 Ill. App. 372.

WILLIAM H. SEXTON and N. L. PIOTROWSKI, for defendant in error; DAVID R. LEVY, of counsel.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 253*—*effect of calling attention to witnesses or particular testimony.* The practice of calling special attention to particular witnesses or particular testimony in instructions to the jury may so effect the result as to constitute reversible error.

2. INSTRUCTIONS, § 101*—*credibility of particular classes of persons.* Where other instructions given were a sufficient guide to the jury in weighing the evidence, including that of doctors, a special instruction as to the testimony and credibility of the doctors was held to be reversible error, the jury being informed that they were not bound to take as absolutely true the testimony of any doctor or expert, which, under the peculiar circumstances of the case, could hardly fail to convey the impression that the testimony of the doctors should be scrutinized more closely than that of other witnesses.

3. INSTRUCTIONS, § 95*—*credibility of witnesses.* The principle that a jury is not bound to accept as true the testimony of any witness, if there are any facts or circumstances tending to discredit his evidence, is not peculiarly or especially applicable to the testimony of doctors or experts, so that such experts should not be singled out in announcing the general rule to the jury.

4. MUNICIPAL CORPORATIONS, § 994*—*what constitutes negligence in care of sidewalk.* In an action against a city for personal injuries from a fall on a defective sidewalk, evidence held to show defendant negligent, so as to require a reversal of a judgment on a verdict of not guilty.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Raphael Jackson and Michael Jackson, trading as R. Jackson & Company, Defendants in Error, v. Grand Crossing Tack Company, Plaintiff in Error.

Gen. No. 19,792. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 4, 1915. Rehearing denied and additional opinion filed February 8, 1915.

Statement of the Case.

Action by Raphael Jackson and Michael Jackson, trading as R. Jackson & Company, against Grand Crossing Tack Company, a corporation. Defendant entered an appearance and filed a written demand for a jury in apt time. From an order entered on motion of plaintiffs for dismissal of the suit "without costs, it appearing to the court that no costs have accrued to either party to this cause," defendant brings error.

The record filed in the Appellate Court consisted of certified copies of the summons, statement of claim, appearance, affidavit of merits and judgment of dismissal. No bill of exceptions, statement of facts or stenographic report appeared in the record.

A. W. MARTIN and EDWARD H. S. MARTIN, for plaintiff in error.

HARRY C. LEEMON, for defendants in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1265*—*necessity of showing error in proceedings in trial court.* When the record and proceedings of a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jackson et al. v. Grand Crossing Tack Co., 191 Ill. App. 375.

trial court are sought to be reviewed by writ of error, the burden is on the plaintiff in error to show that the proceedings were erroneous, to overcome the presumption of regularity and freedom from error indulged in on review.

2. **APPEAL AND ERROR, § 1265***—*presumptions to support finding of trial court.* In reviewing a judgment by writ of error every reasonable intendment not negated by the record will be indulged in support of the judgment below.

3. **APPEAL AND ERROR, § 1303***—*presumption of sufficiency of evidence to sustain finding.* Where in an order of dismissal the trial court found no costs to have accrued to either party, the finding is presumed to be based upon evidence sufficient to sustain it in the absence of a statement of facts or stenographic report in the record.

4. **APPEAL AND ERROR, § 1303***—*effect of statutory requirement as against finding.* The fact that the statute requires a defendant demanding a jury to pay a fee of six dollars, does not overcome a finding of the court to the contrary, that no costs had accrued to either side upon the entry of an order of dismissal, since a presumption of the sufficiency of the evidence to sustain the finding prevails as against a presumption that the statutory fee was paid in a given case.

5. **MUNICIPAL COURT OF CHICAGO, § 26***—*necessity of statement of facts, transcript or report for review.* If a party has not preserved the evidence for review in the manner prescribed by statute, he is not in a position to question the sufficiency of the evidence to support the finding of the trial court.

6. **APPEAL AND ERROR, § 639***—*impropriety of affidavits to support motion for certificate of importance and appeal.* Affidavits in support of a motion for a certificate of importance and appeal are wholly out of place in the Appellate Court.

7. **MUNICIPAL COURT OF CHICAGO, § 19***—*modification of judgment.* Municipal Court Act (Hurd's R. S., sec. 284, J. & A. ¶ 3333) provides for the vacation, setting aside or modification of a judgment after the expiration of thirty days, upon a proper petition.

8. **COSTS, § 65***—*necessity for motion to retax for review.* The taxation of costs is a matter that cannot be reviewed by an Appellate Court without a motion having been first made in the trial court to retax the costs.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

H. L. Hollister, Appellant, v. Samuel Dinsmore, Appellee.

Gen. No. 19,916. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 4, 1915.

Statement of the Case.

Action by H. L. Hollister against Samuel Dinsmore in trespass on the case and in trover. The trial court held "that the evidence introduced on behalf of the plaintiff did not tend to sustain an action other than in assumpsit. From a judgment on a directed verdict for defendant, plaintiff appeals.

HARRIS F. WILLIAMS, for appellant; ELDON M. VOTAW, of counsel.

No appearance for appellee.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. PLEDGES, § 24*—*effect of conditional delivery of stock to pledgor.* Where it appeared that defendant executed and delivered a note to plaintiff and deposited with him as collateral security a certificate of stock in a corporation, and that the note being not paid when due, defendant called at plaintiff's office and requested permission to take the collateral, sell it and bring back the proceeds, saying that he had a chance to sell all his stock in the company including that in plaintiff's hands, but that the purchaser wanted all or none, and the amount then due to plaintiff was computed and a demand note for that amount made out and signed by defendant, and the collateral was delivered to him for the pur-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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pose and upon the understanding stated and defendant sold the stock but failed to account for the proceeds, *held* that the delivery of the stock by plaintiff to defendant was not an unconditional delivery of the same, but that defendant received it merely as the agent of the plaintiff for the special and limited purpose of selling the same for plaintiff's benefit, and that plaintiff's lien was not thereby lost, and the failure or refusal of defendant to return either the stock or the proceeds constituted a conversion.

2. TROVER AND CONVERSION, § 34*—*joinder of trover and case*. It is permissible to join counts in trover and in case in the same declaration.

3. TROVER AND CONVERSION, § 34*—*propriety of declaration in case and trover*. Upon a declaration in trespass on the case and in trover for the conversion of a certificate of stock intrusted to a pledgor to sell and account for the proceeds to the pledgee, *held* the trial court erred in finding no recovery could be had except in assumption.

4. PLEDGES, § 46*—*measure of damages for conversion by pledgor*. Where a pledgor secures possession of stock in a corporation from his pledgee for the purpose of effecting a sale of the same and accounting for the proceeds to the pledgee, upon his failure to do so the measure of damages is the value of the collateral with interest from the time of the conversion, unless such amount exceeds the sum due the pledgee, and such value is, of course, material in a tort action.

R. Stuart Adam, Administrator, Appellee, v. Columbian National Life Insurance Company, Appellant.

Gen. No. 19,981. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 4, 1915. Rehearing denied and additional opinion filed February 18, 1915.

Statement of the Case.

Action by R. Stuart Adam, suing as the administrator of the estate of George J. Adam, deceased, against

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Columbian National Life Insurance Company, to recover on a life insurance policy for \$5,000. From a judgment in favor of plaintiff for the full amount of the policy and interest, defendant appeals.

At the trial, plaintiff introduced in evidence the policy, receipts for all the annual premiums accruing during the lifetime of the deceased, proof of the death of the insured, the appointment of an administrator and the delivery of proofs of death to the insurance company. Defendants then offered to prove that the last annual premium, due on December 6, 1911, was never in fact paid; that instead of paying that premium the insured gave his promissory note for the amount thereof, due six months thereafter, and then extended two months further, which note contained a recital to the effect that it was given "with the full knowledge and intent," on the part of the insured, that if the note was not paid when due, "said policy shall become absolutely null and void, subject to the legal conditions contained therein relating to cash value, paid up and extended insurance," without further notice; and that said note was never paid. Defendant offered to prove further, by oral testimony, that at the time such note was given it was fully explained to the insured that a failure to pay the note at maturity "would absolutely void his policy." Plaintiff objected to all this offered evidence and the objections were sustained by the trial court, to which ruling exceptions were duly preserved. No other defense being made, the court thereupon instructed the jury to find a verdict for plaintiff for the full amount of the policy and interest.

Plaintiff offered in evidence five receipts. The first read as follows: "*Received the annual premium due Dec. 6, '07, as per statement in the margin hereof, on policy No.,*" etc.; and in the margin was the following: "Premium for one year, \$163.00." The next three were in the same form and each was marked with the

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"date when *paid*." The fifth "receipt," the one in question, was entirely different from the others. While it was labeled a "premium receipt" across the margin, the words of such receipt were as follows: "The premium due as set forth below has been *settled* this day." Beneath this statement the policy number, the "due date" and the amount of the premium were given.

HOLT, CUTTING & SIDLEY, for appellant.

ALBERT L. HOPKINS, for appellee; WILLIAM BURREY, of counsel.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 149*—*effect of recital of payment of first premium.* Insurance companies are concluded on ground of public policy by a recital in the policy to the effect that the first premium has been paid and will not be heard to assert to the contrary for the purpose of avoiding the contract of insurance, if the policy actually has been delivered.

2. INSURANCE, § 886*—*explanation of premium receipt by parol.* Where a contract of insurance is already in force and is a continuing contract requiring periodical payments to be made to keep it alive and prevent forfeiture, and a receipt is given merely for the purpose of acknowledging the payment of one of the subsequent premiums as required by the terms of the contract, no new contract is thereby created and there is, therefore, nothing in such case to prevent the application of the ordinary rule permitting receipts to be explained or contradicted by parol evidence, to show that a subsequent premium was not in fact paid.

3. WORDS AND PHRASES—to "*settle*" not equivalent of to "*pay*." The word "settle" has a double meaning and is used alike to denote an adjustment of a demand and a payment, since it does not necessarily convey the meaning of "payment."

4. INSURANCE, § 886*—*admissibility of parol evidence.* Where it appeared from plaintiff's evidence that while each of four receipts

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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acknowledged in terms that an annual premium of a certain sum had been "paid" to a life insurance company and the fifth merely stated that the premium due on a certain date had been "settled," and after this "receipt" had been offered in evidence plaintiff also introduced a copy of a letter written by plaintiff's attorney to the company stating that a note was in payment of the premium in question and authorizing the company to deduct the amount due on that note from the amount claimed to be due under the policy, *held*, from plaintiff's own evidence, that the last receipt was not given to evidence a cash payment, but was given in exchange for the note of the insured; and the execution of the receipt and of the note were parts of one and the same transaction, so that defendant was clearly entitled to introduce the note for the purpose of showing the whole transaction and to explain the sense in which the word "settle" was used in the last receipt, as bearing on the fact whether the last annual premium of a policy was paid, as a condition thereof, the question of the effect of such a condition not being presented for review.

The People of the State of Illinois, Defendant in Error, v. Edward M. Seymour, Plaintiff in Error.

Gen. No. 20,043.

1. CONTEMPT, § 2*—*nature of power to punish*. All courts of record independent of statutory provisions have an inherent power to punish contempts committed *in facie curiæ*.

2. CONTEMPT, § 2*—*power of court to punish for*. The power of a court to punish for contempt necessarily includes all acts calculated to impede, embarrass or obstruct the court in administration of justice, the primary question being in such cases of alleged contempt whether there has or has not been an interference with the due administration of justice.

3. CONTEMPT, § 51*—*nature of proceedings*. Proceedings for contempt of court are of two classes: Those which are criminal in their nature, sometimes called common-law contempts, and those which are intended as purely civil remedies, which ordinarily arise out of the alleged violation of some order entered in the course of a chancery proceeding.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Seymour, 191 Ill. App. 381.

4. CONTEMPT, § 61*—*effect of trial on answer*. Where in a case of common-law contempt the answers of defendant prove false the remedy is by indictment for perjury, as such defendant must be tried upon his answer, and found guilty or purged.

5. CONTEMPT, § 68*—*inadmissibility of evidence extrinsic to answer*. In cases of common-law jurisdiction for contempt the defendant is tried on his answer made to interrogatories filed and no other evidence is heard, so that if the party purges himself of the contempt by his answer he will be discharged.

6. CONTEMPT, § 68*—*admissibility of affidavits*. In a proceeding for contempt for violation of orders in chancery the court will hear affidavits *pro* and *con*, and may also avail itself of other legal evidence that will aid the court to determine the question according to right and justice.

7. CONTEMPT, § 1*—*direct contempt*. When an act constituting contempt of court is committed in the actual presence of the court while sitting as such, or so near to the court as to interrupt its proceedings, it is denominated a direct contempt and is punishable in a summary way by fine or imprisonment or both, without any preliminary affidavit, process or interrogatories, whether it be a civil contempt for refusing in open court to abide by an order of a court of chancery or a common-law contempt, criminal in its nature, since the facts constituting the alleged contempt are within the personal knowledge of the court.

8. CONTEMPT, § 64*—*right of trial by jury*. In a proceeding for a contempt of court there is no constitutional right of trial by jury involved.

9. CONTEMPT, § 51*—*nature of proceedings*. While proceedings for common-law contempt are in their nature criminal, they are not criminal prosecutions within the meaning of the Bill of Rights, providing that in all criminal prosecutions the accused shall have a right to a jury trial, a copy of the indictment or information, to meet the witnesses face to face and to have process to compel the attendance of witnesses in his behalf, such cases not being governed by the ordinary rules of criminal procedure.

10. CONTEMPT, § 33*—*interference with property taken under writ of restitution*. In a proceeding for common-law contempt, where it appeared by defendant's answers that he advised a person to regain possession by force if necessary of premises from which she had been ousted less than twenty-four hours before by a writ of restitution that had not yet been returned by the bailiff, and his answers did not deny any of the material facts nor did not present any other facts or circumstances that were sufficient to explain or justify his wilful and unlawful interference with the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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judgment and process of the court, it constituted, in effect, a plea of guilty to the charge of contempt in spite of his disavowal of any intention to commit a contempt, the disavowal being inconsistent with his acts and contradicted by them so that the court properly found him guilty upon his answer.

11. WITNESSES, § 249*—*privilege as to incrimination personal*. The right of a defendant to refuse to answer upon the ground that it may tend to criminate him is a personal privilege which must be specifically claimed or it will be considered as waived.

12. CONTEMPT, § 61*—*necessity of answering*. The constitutional provision "that no person shall be compelled in any criminal case to give evidence against himself" has no application to a contempt proceedings, even though it be of that class which would be considered as criminal in its nature.

13. CONTEMPT, 78*—*proper order as to punishment*. In a proceeding for a common-law contempt punishment is held not excessive, for the reason that the judgment provided that in case of default in payment of the fine he should stand committed until the fine should be paid "or until said respondent shall have been discharged according to law."

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 4, 1915. Rehearing denied February 16, 1915.

Statement by the Court. By this writ of error it is sought to reverse a judgment of the Municipal Court imposing a fine of fifty dollars upon the plaintiff in error, hereinafter called the respondent, for contempt of court. The writ of error was sued out of the Supreme Court, but upon motion the cause was transferred to this court in October, 1913.

The following facts appear from the affidavit of the relator and the sworn answer of the respondent: In February, 1913, one John Konopa was the owner of certain premises in Chicago, occupied by Mrs. Anna Przybylski. The Eagle Brewing Company, claiming to be entitled to the possession of said premises, brought a forcible detainer suit against Mrs. Przybylski in the Municipal Court, and on February 13, 1913, a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

judgment for possession was entered against her by default. She made a motion the next day to vacate the judgment, supported by affidavits, which motion was heard and overruled. On February 20, 1913, she entered into a contract with Konopa for the purchase of the premises in question for the sum of six thousand dollars, payable fifty dollars as earnest money, thirty-nine hundred and fifty dollars in forty days, and the remainder by assuming the payment of an incumbrance of two thousand dollars. This contract was in the usual form of contracts for the purchase and sale of real estate, and contained the usual provisions regarding examination of the abstract of title, forfeiture for nonperformance, etc. There was no provision in it authorizing the purchaser to take possession of the premises prior to the consummation of the sale, but the sale was made "subject to existing leases expiring monthly, the purchaser to be entitled to the rents, if any, from February 20, 1913." Mrs. Przybylski was in possession at the time this contract was made. Five days later a writ of restitution was issued upon the judgment in favor of the Brewing Company, and delivered to a deputy bailiff named Remus to be executed. The deputy removed Mrs. Przybylski and her effects from the premises and locked the doors, but did not return the writ to the clerk's office, nor make any return upon the same. The record does not show when, if ever, such a return was made. The day after she was thus dispossessed, Mrs. Przybylski consulted the respondent, who is an attorney at law, but who had not represented her in the forcible detainer proceedings. After hearing her story he went to the office of the clerk of the Municipal Court and made inquiries regarding the status of the forcible detainer proceedings. He was informed by a clerk that a writ of restitution had been issued and executed and that the keys to the premises in question had been delivered to the attorney for the Brewing Company, but that Remus, the

deputy bailiff, still had the writ in his possession and had made no return of the same. The respondent inquired as to the names of the persons who had assisted Remus in dispossessing Mrs. Przybylski, but was referred to Remus for information upon that point. Remus was not about, however, so the respondent and Mrs. Przybylski sought the judge who had entered the judgment. They told him of the eviction, and of her purchase of the property after the judgment was entered. The judge said that nothing could be done except upon notice to opposing counsel. The respondent admitted in his answer that he then told Mrs. Przybylski to go back to the premises, and if no custodian was in charge of the same, "to pull the lock off the door, put her beds and the like inside, and to stay there over night, or until the further order of the court," and that he sent with her a young man from his office to see that these directions were carried out, instructing him, however, not to create any disturbance, but merely to make sure that no officer of the court was in actual possession. Pursuant to his advice and instructions, Mrs. Przybylski took possession of the premises. The next day she was again dispossessed by the bailiff, who then placed a custodian in charge of the premises. She made another attempt to re-enter by force, but desisted when threatened by the custodian.

On May 3, 1913, a document called an information was filed in the Municipal Court, signed and sworn to by the attorney for the bailiff of that court. This information states that on February 25, 1913, "a writ in words and figures as shown by a copy thereof attached and marked Exhibit A and made a part of this information," was issued out of said court "in a cause wherein this court had jurisdiction of the parties thereto and the subject-matter thereof"; that said writ was received by the bailiff and was delivered to a deputy named Remus, for service; that on February 28, 1913, Remus "dispossessed the defendant therein

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named from the premises described in said writ, but made no return on said writ"; that thereafter the respondent, Seymour, became the attorney for the defendant in said writ, and "with full notice and knowledge of the existence of said writ and of the action of the deputy bailiff thereunder, and without leave of court, advised and directed the said defendant in said writ by force to repossess herself of said premises in said writ described, and to withhold possession from the plaintiff in said writ and the bailiff of this court"; that acting upon his advice, "the defendant in said writ repossessed herself of said premises," and held the same until she was "redispossessed" by the bailiff; that thereafter, acting upon respondent's advice, she broke open the rear door of the premises and was about to break another, when she was threatened with bodily harm by the custodian, and left the premises; that during all these transactions, the said writ was in the possession and under the control of the deputy bailiff "unreturned"; and that this conduct of Seymour "tended to belittle this court and obstruct, embarrass and impair the administration of justice," and was an unlawful interference with the duty of an officer of the court.

The respondent filed a motion to quash the information because of its alleged uncertainty and insufficiency. Upon the hearing of this motion it appeared that the writ referred to in the information as "Exhibit A" had not been attached as an exhibit, but upon leave granted, a copy of the writ was then attached, and thereupon the motion to quash was overruled and the respondent was ruled to answer within ten days the information as thus amended. He filed an answer under oath, setting up, in substance, the facts hereinabove stated and disclaiming any intention on his part of committing a contempt of court, or of obstructing the due administration of justice. Later, interrogatories

were also filed to which he filed answers setting up the same facts, in substance, as in his answer to the information. After an examination of the information and the sworn answers, and after arguments of counsel, the court found that the answers filed "did not constitute a full and complete defense to the charge of contempt made in the information filed," and that respondent was guilty of contempt.

SCOTT O. CAVETTE and E. M. SEYMOUR, *pro se*, for appellant.

MACLAY HOYNE, for defendant in error; JOHN STELK, of counsel.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

The briefs of the respondent were evidently prepared for the Supreme Court, and were filed here without revision after the case was transferred. In consequence, we have been obliged to sift from the briefs and arguments such contentions as seem to be properly before this court. Briefly stated, these contentions are that the Municipal Court erred: (1) In denying the respondent's motion to quash the information; (2) in compelling him to give evidence against himself; (3) in denying him a jury trial; (4) in refusing to discharge him upon his answer. Underlying each and all of these alleged errors is the theory that the proceeding in the Municipal Court was a criminal prosecution, that all the technical formalities incident to the trial of criminal cases must be strictly observed in a contempt case, and that the failure of the Municipal Court to accept and act upon that theory in this case violated the provisions of the Constitution of the United States and of the State of Illinois relating to due process of law and to the right of trial by jury.

The proposition that "all courts of record have an inherent power to punish contempts committed *in facie curiæ*" (Rapalje on Contempts, sec. 1) is too firmly established in this State to admit of argument. In the early case of *Clark v. People*, Breese, 340, it was said that such a power "is an incident to all courts of justice independent of statutory provisions." In *Dahnke v. People*, 168 Ill. 102, it was said: "In *Stuart v. People*, 3 Scam. 395, we held, that the power was inherent in every court of justice to defend itself when attacked, just as much as the individual man has a right to defend himself for his own preservation; and we also there held, that in the power to punish for contempt are necessarily 'included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts will be considered as done in the presence of the court.' * * * It has been said, that the power of the court in the matter of contempt cannot be defined within any limits, and that the primary question in all cases of alleged contempt is, 'whether there has or has not been an interference or an attempt to interfere with the due administration of justice.'"

Proceedings for contempt of court are of two classes: Those which are criminal in their nature, which are sometimes called common-law contempts, and those which are intended as purely civil remedies, which ordinarily arise out of the alleged violation of some order entered in the course of a chancery proceeding. In *Hake v. People*, 230 Ill. 174, it was said (p. 185): "There is a distinction to be noted, in several respects, between practice in contempt proceedings in a court of chancery and proceedings to punish contempts in a court at law. Where the proceeding is in a court of equity, the contempt is punished as an incident to the enforcement of orders and decrees made in furtherance of the remedy sought. In cases of common-law cognizance the contempt usually consists in some act in disregard of the power and dignity of the court, and which has a tendency to interrupt or disturb the due

administration of justice. In cases of common-law jurisdiction for contempt the defendant is tried upon his answer made to interrogatories filed. No other evidence is heard. If the answers prove false the remedy is by indictment for perjury, but if the party purges himself of the contempt by his answer he will be discharged. In a proceeding for contempt for violation of orders in chancery the court will hear affidavits *pro* and *con*, and may also avail itself of any other legal evidence that will aid the court to determine the question according to right and justice." Many Illinois cases are cited in which this distinction was recognized, and the reason for the distinction is shown by a quotation from the opinion in the case of *O'Brien v. People*, 216 Ill. 354, wherein it was said: "When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people, as represented by their judicial tribunals. In such cases the application for attachment may be made in the original cause, yet the contempt proceeding will be a distinct case criminal in its nature. Cases of this kind are clearly distinguished from cases where the parties to a civil suit, having the right to demand that the other party do some act for their benefit, obtain an order from a proper court commanding the act to be done, and upon refusal the court, by way of executing its orders, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant and not in the public interest, merely."

There is a further distinction in the procedure in contempt cases between what are known as direct

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contempts and those which are called constructive contempts. When the act constituting a contempt is committed in the actual presence of the court while sitting as such, "or so near to the court as to interrupt its proceedings," it is denominated a direct contempt (*Stuart v. People, supra; Dahnke v. People, supra*). Such contempts are punishable in a summary way by fine or imprisonment or both, without any preliminary affidavit, process or interrogatories (Rapalje on Contempts, sec. 93), whether they be civil contempts for refusing in open court to abide by an order of a court of chancery, as in the case of *Tolman v. Jones*, 114 Ill. 147, or common-law contempts, criminal in their nature, such as that involved in the case of *People v. Gard*, 259 Ill. 238, for the reason that in all such cases the facts constituting the alleged contempt are within the personal knowledge of the court, and the respondent is usually present in the court room at the time. Acts which are committed not in the actual presence of the court nor so near to the court as to interrupt its proceedings, but which nevertheless tend to obstruct, embarrass, impede or prevent the due administration of justice, are denominated constructive contempts (*Stuart v. People, supra; People v. Wilson*, 64 Ill. 195), because they are only constructively *in facie curiæ*. In such cases, the facts are ordinarily not within the personal knowledge of the court and the respondent is not ordinarily in court, and therefore the procedure for the punishment of such contempts is necessarily of a different and more formal character. Usually—but not necessarily, as will be hereafter shown—the facts constituting a constructive contempt, whether it be of a civil or criminal nature, are brought to the attention of the court by affidavit, and a rule is then entered against the alleged offender to show cause why he should not be attached and punished for contempt. Rapalje on Contempts, secs. 93, 103. From this point on, the practice in cases of constructive contempt of a

criminal nature is essentially different from that which obtains in cases of constructive contempt for failing to comply with an order entered in a chancery case. If the offense charged is a common-law or criminal contempt as above defined, the respondent may file a sworn answer to the rule, or he may insist that interrogatories be filed for him to answer under oath, and if his sworn answer in either case is sufficient to acquit him of the charge of contempt, he must be forthwith discharged. *Hake v. People, supra*; *Oster v. People*, 192 Ill. 473; *Welch v. People*, 30 Ill. App. 399; *Stull v. People*, 173 Ill. App. 512. In such cases, the hearing of evidence, or counter-affidavits, in contradiction of the respondents' sworn answer, is "without warrant of law" (*Welch v. People, supra*; *Stull v. People, supra*). If, on the other hand, the alleged contempt be of the nature of a civil contempt, as above defined, the answer of the respondent is not conclusive, but the court may hear affidavits, or any proper testimony, to enable it to determine the truth of the matter according to justice and equity (*Hake v. People, supra*).

In *Oster v. People, supra*, it was held that a contempt proceeding brought in the name and on behalf of the people for the purpose of punishing a receiver for his alleged participation in the wrongful removal and secretion of certain goods in his custody, with the intention of depriving the court of the control thereof, was criminal or *quasi* criminal in its nature, and that therefore the sworn answer of the receiver, in which he explicitly denied any participation in the alleged wrongful acts, was conclusive, so far as that proceeding was concerned, and entitled the respondent to a discharge. In that case, the contempt proceeding was commenced by entering an order for an attachment against the receiver, in the course of a hearing upon a petition in the chancery suit, without the filing of any preliminary affidavit or information. As to this mode of proceeding, the Court said, in substance, that while, as a

general rule, an attachment for a contempt of court, committed out of the presence of the court, should be based upon an affidavit as to the truth of the facts constituting the alleged contempt, still the filing or presentation of such an affidavit is not essential to the jurisdiction of the court where, as in that case the facts constituting the alleged contempt had been otherwise brought to the attention of the court, and the respondent was otherwise fully advised—in that case, by the order for the attachment—of what he would be called upon to meet and answer.

It is almost universally held that a proceeding of this nature does not violate any constitutional right of trial by jury (Rapalje on Contempts, sec. 112), nor does it contravene the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. "In matters of contempt a jury is not required by due process of law" (*People v. Kipley*, 171 Ill. 44, 70; see also, *O'Brien v. People*, *supra*, at p. 370). In *Storey v. People*, 79 Ill. 45, 52, it was said: "The common law mode of proceeding in cases of contempt, presents no question of fact to be tried by a jury. *The defendant determines, by his own answer, under oath whether he is guilty of that which is charged against him as a contempt of court, and if he fail thereby to purge himself, the court may, at once, impose the punishment.*" The opinion of the late Judge Gary, in the case of *Welch v. People*, *supra*, is to the same effect.

From an examination of these decisions, as well as others in this State on the general subject of contempts, it will be seen that our courts have generally been careful to say that such proceedings as the one here in question are "*in the nature*" of criminal proceedings; that is, that for certain purposes and to a certain limited extent, they will be considered as criminal cases. The fact that such proceedings are thus

characterized implies that they are not considered as criminal cases for all purposes. So far as we are advised, it has never been held in this State that they are criminal prosecutions within the meaning of the ninth section of the Bill of Rights, which provides that "in all criminal prosecutions" the accused shall have the right to a jury trial, a copy of the indictment or information, "to meet the witnesses face to face" and to have process to compel the attendance of witnesses in his behalf. When such proceedings are prosecuted in the name of the People, for the purpose of inflicting punishment for wilful contumacy, they are said to be *quasi* criminal in character because of the object sought to be accomplished, but they are not criminal prosecutions in the ordinary sense, nor are they governed by the ordinary rules of criminal procedure. It is necessary that the respondent be apprised with reasonable certainty, by affidavit, information or rule to show cause, of the nature of the charge against him and of the facts upon which the alleged contempt is predicated, and it is also requisite that he shall have a reasonable opportunity to answer the charge by a written answer under oath. If, by his sworn answer, he specifically denies the facts upon which the charge is founded, or if he sets up other facts which, if true, are sufficient to acquit him of the charge, then he must be discharged, for the reason that his answer in such case presents an issue of fact which cannot be tried by the court in a proceeding of this character. Whether his answer, if true, is sufficient to acquit him of the charge is not a question of fact, but a question of law. If his answer is adjudged by the court to be insufficient to acquit him, or if his answer admits the material facts charged to be true, then there is no issue of fact to be tried, and in such case, if such facts constitute a wilful contempt of court, the order imposing punishment for such contempt is analogous to a sentence pronounced upon a plea of guilty in a criminal case. *Welch v.*

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People, supra. There being nothing in such case for a jury to try, no constitutional right of trial by jury is in any manner involved.

The procedure followed by the Municipal Court in this case was in accord with the practice above stated, and this being true, the constitutional requirement of due process of law was duly observed. *Flannery v. People*, 225 Ill. 62-72. The respondent was fully apprised by the information, as amended, of the nature of the charge against him and of the facts he was called upon to explain, deny or justify. The facts stated in the amended information, if true, constituted a wilful contempt of court on the part of respondent. He was given every opportunity to purge himself of the alleged contempt, but failed to do so. By his answers to the rule and to the interrogatories, he admitted, in effect, that with full knowledge of the facts alleged in the information he advised Mrs. Przybylski to regain possession, by force if necessary, of premises from which she had been ousted less than twenty-four hours before, under a writ of restitution that had not yet been returned by the bailiff. His answers did not deny any of the material facts, nor did they present any other facts or circumstances that were sufficient to explain or justify this wilful and unlawful interference with the judgment and process of the court. Therefore, in effect, he pleaded guilty to the charge of contempt. His disavowal of any intention to commit a contempt is inconsistent with his acts and is contradicted by them. Therefore the court properly found him guilty upon his own answer. The alleged constitutional questions now raised by him were mentioned for the first time in the Municipal Court after the court had pronounced its finding, in a written motion in arrest of judgment, and then only in the most general terms. He did not at any time claim any right to refuse to answer upon the ground that his answer might tend to criminate him. The right to refuse to answer

upon that ground is a personal privilege, and must be specifically claimed or it will be considered as waived. *Bolen v. People*, 184 Ill. 338; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287. Moreover, as to this point, we agree with the Appellate Court of the Third District in holding that the constitutional provision that "no person shall be compelled in any criminal case to give evidence against himself," has no application to a contempt proceeding, even though it be of that class which is considered as criminal in its nature (*O'Neil v. People*, 113 Ill. App. 195). Nor does the fact that the conduct of the respondent may, perhaps, have amounted to a criminal offense,—as to which we express no opinion,—and may have been punishable as such, relieve the respondent from liability for contempt of court. *Flannery v. People*, *supra*; *O'Neil v. People*, *supra*. The point made that the punishment is excessive because no limit is fixed for imprisonment in case the fine is not paid is untenable, for the reason that the judgment provides that in case of default in the payment of the fine he shall stand committed until the fine shall have been paid, "or until said respondent shall have been discharged according to law." This is a proper judgment in such cases. *Kettles v. People*, 221 Ill. 221, 223; *McDonald v. People*, 86 Ill. App. 558.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

Hart v. Northwestern Trust & Savings Bank, 191 Ill. App. 396.

B. Hart et al., Plaintiffs in Error, v. Northwestern Trust & Savings Bank, Defendant in Error.

Gen. No. 20,077.

PRINCIPAL AND AGENT, § 131*—*power of agent to collect and give receipt.* Where an agent was sent by his principal to a bank to collect for materials furnished by the principal on a building and the bank drew a check on itself and handed it to the agent, who then indorsed it with his principal's firm name, indicating that it was by himself, and disappeared, *held* the principal could not recover the sum in question from the bank, as the delivery of the check to the agent and the payment of it by the bank constituted one transaction amounting to a collection, the check being an acknowledgment of indebtedness and the agent's indorsement a receipt of payment.

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 4, 1915.

BAKER & HOLDER, for plaintiffs in error.

DAVID & ZILLMAN, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

In August, 1912, the owner of a building then under construction in Chicago was indebted to the plaintiffs in error, partners doing business under the firm name of Hart & Page Lime Company, in the sum of \$285, for the value of certain building materials furnished by them. The owner of the building had arranged with the defendant bank for a loan, out of which the amounts due for materials furnished were paid to the several contractors upon their filing with the bank written waivers of their lien rights under the Mechanic's Lien Act. Plaintiffs in error had in their employ a man named Ross. His duties were somewhat general

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in character. He attended to receiving material from freight cars, receipted the freight bills, directed the unloading of the cars, helped to unload them, attended to the deliveries of material, employed drivers, and supervised the manner of loading, the number of teams and number of trips made by them; in the absence of Mr. Hart, who was the general manager of plaintiff's Chicago office, he took charge of the office; and he did whatever else he was directed to do by Mr. Hart.

On August 31, 1912, Hart sent Ross to the bank to collect the bill due for materials furnished to the building above mentioned. Before going to the bank for this purpose, Ross prepared a written waiver of lien, and signed it, in the presence and with the approval of Hart, in the name of the firm, "per E. F. Ross." He had been in the habit of making out and signing such waivers, with the knowledge and consent of the plaintiffs in error. Ross then went to the owner, got an order from him for the payment of the bill, and went with the owner to the bank, where he presented the lien waiver and order, and asked for the money. The teller in charge of the loan department of the bank made out a check of the bank upon itself for the amount due, payable to the order of the plaintiffs in error, had it signed by the vice-president of the bank, and handed it to Ross. Ross asked for the money, and after indorsing the check in the name of the plaintiffs, "per E. F. Ross," the money was paid him by the paying teller. Ross then disappeared, and the money was never paid to the plaintiffs. Hart testified that he did not know what became of Ross, and that no effort had been made to find him. Plaintiffs sued the bank for the amount of the check, claiming the bank had cashed the same upon an unauthorized indorsement. After hearing the evidence above stated, the court directed a verdict for the defendant. The plaintiffs sued out this writ of error.

The plaintiffs admitted, both on the trial below and

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in this court, that when Ross was sent to the bank he was authorized to collect the \$285 which the bank paid him. It is claimed, however, that his authority to collect did not authorize him to indorse the check which the bank gave him—in other words, that his authority as the agent of the plaintiffs ceased when he received the check,—and that therefore the bank remained liable to the plaintiffs, notwithstanding the payment to Ross. The contention is extremely technical, and we think it is without substantial merit. Ross had no authority to receive a check in payment of the account, and when the check was handed to him he did not accept it in payment, but at once asked for the money. The delivery of the check to him and the payment of it by the bank upon his indorsement all constituted one transaction, and amounted to a collection by Ross of the amount due. The check was not that of a depositor, drawn against his deposit in the bank. It was the bank's own check, drawn upon itself. It was a mere acknowledgment of indebtedness, like the cashier's check in *Clark v. Chicago Title & Trust Co.*, 186 Ill. 440, and the indorsement of Ross was, in effect, but a simple receipt for such indebtedness. The purpose the bank had in view in giving the check to Ross and requiring him to indorse it before paying over the money was, evidently, to preserve a convenient record of the transaction by retaining the cancelled check as a voucher for the payment.

In the view we take of the facts and the legal effect of the same, we deem it unnecessary to discuss the contention of plaintiff's counsel that authority to receive a check does not include authority to indorse it.

For the reasons stated, the judgment of the Municipal Court was correct, and it will be accordingly affirmed.

Affirmed.

**Ottillia Dawson, Defendant in Error, v. A. Brom Allen,
Plaintiff in Error.**

Gen. No. 20,089. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed February 4, 1915.

Statement of the Case.

Action by Ottillia Dawson against Dr. A. Brom Allen for injury alleged to have been sustained to plaintiff's foot through the carelessness of a dentist engaged in extracting a tooth. From a judgment for \$300 in favor of plaintiff, defendant brings error.

Before pulling the tooth, the plaintiff was anesthetized by the inhalation of nitrous oxide gas administered by a trained nurse in the defendant's office. The whole time during which the plaintiff was in the dentist's chair did not exceed five minutes, and the period of complete unconsciousness (during which the tooth was extracted) did not exceed forty seconds. The plaintiff did not claim there was anything wrong with the operation itself or the administration of the anæsthetic. Her claim was that her foot was injured at that time. She testified that before the operation her foot was in perfect condition; that immediately after the operation, she felt a sharp pain in her left foot, and cried out: "Oh, my foot"; that defendant said: "Your foot is all right; get up and walk"; that she walked into an adjoining room, where she rested a few minutes on a couch, and then left the doctor's office, suffering great pain. This happened about noon time. She went about her usual duties during the afternoon, but the pain in her foot continued. On arriving at her home she removed her shoe and discov-

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ered a bruise on the instep, about in line with the buttons of the shoe, and about the size of a silver dollar. A doctor was called, who prescribed hot applications and bandages. She claimed she was unable to perform her usual work, that of a school teacher, for a period of six weeks, and expended \$27 for doctor's bills and medicine. The defendant and his assistant both testified that nothing happened while the plaintiff was in the chair that could have caused the injury described by her.

In the argument to the jury, plaintiff's counsel said: "We do not, I contend, have to go further than to show that this accident happened at that place. It happened in her helpless condition. *It was something that would not ordinarily happen in a dentist's chair, and that is all we have to show; it is all we can show, it is all you or anybody else can show under the same circumstances.*"

H. L. HOWARD, for plaintiff in error.

CHARLES W. LAMBOURN, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. PHYSICIANS AND SURGEONS, § 14*—*care required of.* Physicians, surgeons and dentists are responsible only for the failure to exercise such reasonable care and skill as those in good practice ordinarily use.

2. DENTISTS, § 3*—*what constitutes negligence of.* Where a dentist gives an anæsthetic to his patient for the purpose of extracting a tooth, the dentist is not an insurer against all possible injuries or accidents, and a presumption of negligence on the part of the dentist does not arise from proof of the mere fact that plaintiff without her fault sustained an injury of unusual character while she was in the care and control of the dentist.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

3. DENTISTS, § 3*—*instruction as to presumption of negligence.* In an action for an injury to plaintiff's foot alleged to have been sustained while under the care of a dentist, an instruction to the jury that if they believe from the evidence that plaintiff was hurt without fault on her part while she was under the control of defendant and her injury was of such a nature as would not happen in the ordinary course of things under such circumstances, then the jury have a right to presume that the injury was caused by defendant's negligence and that the burden is upon the defendant to overcome that presumption, *held* erroneous since it is necessary to show that the injury is of such a character that it would not ordinarily occur if due care is used.

4. DENTISTS, § 3*—*when doctrine of res ipsa loquitur applies.* The doctrine of *res ipsa loquitur* can only be properly invoked where there is some evidence tending to prove that an injury complained of was caused by something under the defendant's control.

5. DENTISTS, § 3*—*necessity of control of cause of injury.* Where it was admitted that there was no evidence from which to deduce any theory of what actually caused an injury to plaintiff's foot alleged to have been sustained, it was erroneous for the court to assume by its instructions that the injury was caused by something under defendant's control while plaintiff was under his care for the purpose of extracting a tooth, since it might have been caused by pure accident or by something not at all within the control of the dentist, the cause of the injury being a question of fact and one of the main issues in the case.

6. DENTISTS, § 3*—*necessity of control of cause of injury before presumption of negligence may arise.* In an action for injury to plaintiff's foot while she was in a dental chair, remarks of counsel voicing the theory that if she was hurt without fault on her part while under the care of defendant, and her injury was of such a nature as would not happen in the ordinary course of things under such circumstances, the jury had a right to presume that the injury was caused by defendant's negligence, placing the burden on defendant to overcome the presumption of negligence, *held* prejudicially erroneous in assuming the cause was within defendant's control.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Frank Parmelee Co. v. George W. Jackson, Inc., 191 Ill. App. 402.

**Frank Parmelee Company, Plaintiff in Error, v.
George W. Jackson, Inc., Defendant in Error.**

Gen. No. 19,483.

VENDOR AND PURCHASER, § 344*—*recovery of money paid for guaranty policy of title.* Where grantor's first deed conveyed an entire lot including an intervening space of 11 inches between the north 100 feet and the south 65 feet, conveyed in grantor's second deed, and the purchaser agreed to waive the survey and accept a guaranty policy of title, *held*, under the evidence, that the transaction proceeded on the theory that the policy would be issued to cover the entire property as described in the first deed, including the 11 inches, so that plaintiff was entitled to recover a fair and reasonable price paid to secure such a policy, upon defendant's refusal to provide one for the entire property.

Error to the Municipal Court of Chicago; the Hon. JOSEPH Z. UHLIR, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and judgment here. Opinion filed February 4, 1915.

SHERIFF, DENT, DOBYNS & FREEMAN, for plaintiff in error.

FOREMAN, LEVIN & ROBERTSON, for defendant in error.

MR. JUSTICE PAM delivered the opinion of the court.

This is a suit brought by the Frank Parmelee Company, a corporation, hereinafter referred to as the plaintiff, against George W. Jackson, Inc., hereinafter referred to as the defendant, to recover \$353.80, the price paid by the plaintiff to the Chicago Title & Trust Company for a guaranty policy of insurance issued by it, guarantying title of the defendant in and to a certain piece of real estate known as "Lot 6 in Blanchard's Subdivision of Block 4, in School Section Addition to Chicago," situated in the city of Chicago, county of Cook, State of Illinois, for which the plaintiff paid defendant \$75,000.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The controversy which led to the beginning of this action arose out of a real estate transaction between the plaintiff and the defendant. Plaintiff purchased from the defendant certain property situated in the city of Chicago. Defendant, in conveying to the plaintiff title to the property that was purchased, executed two deeds which we shall hereafter designate as the first and second deeds, the description in the first deed being as follows:

“Lot six (6) in Blanchard’s Subdivision of Block four (4), in School Section Addition to Chicago, in Section sixteen (16), Township thirty-nine (39) North, Range fourteen (14) East of the Third Principal Meridian, situated in the City of Chicago, County of Cook and State of Illinois.”

The second deed contained the following description:

“The north one hundred (100) feet of Lot six (6) in Blanchard’s Subdivision of Block four (4) in School Section Addition to Chicago; the West half of the South sixty-five (65) feet of Lot six (6) in Blanchard’s Subdivision of Block four (4) in School Section Addition to Chicago; the East half of the South sixty-five (65) feet of Lot six (6) in Blanchard’s Subdivision of Block four (4) in School Section Addition to Chicago, all in Section sixteen (16), Township thirty-nine (39) North, Range fourteen (14) East of the Third Principal Meridian.”

Part of the record in the case is a written stipulation of facts. This stipulation shows that Lot 6 aforementioned is a tract of land fronting on the north on Jackson boulevard, on the south on Boston avenue; that Lot 6 is otherwise known as Nos. 751-753-755 West Jackson boulevard, and 750-752-754 Boston avenue.

The only oral evidence given was that of Fred Norlin, a surveyor, who testified that the length of the lot conveyed by the first deed was 165 feet 11 inches, and the width 50 feet 6¼ inches; that there was on this lot one building, viz., a factory building three stories high, of brick construction; that the said building was 148 feet 10 inches long, and 49 feet 6¼ inches wide; and that

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the north front of the building came right up to the south line of Jackson boulevard.

The second deed conveyed the north 100 feet of Lot 6 in Blanchard's Subdivision of Block 4, etc., and the west and east one-half of the south 65 feet of Lot 6 in Blanchard's Subdivision of Block 4, etc. The second deed transferred only 165 feet of land. The testimony of Mr. Norlin showed that Lot 6 contained 165 feet 11 inches. The second deed omitted to convey the 11 inches between the north 100 feet and the south 65 feet mentioned in the second deed. The first deed, however, conveyed the entire Lot 6, and was therefore inclusive of the 11 inches omitted in the second deed. The building covered this 11 inches. The record is barren of any formal written contract having been entered into by the parties for the sale of this land. We must rely upon the stipulation of facts, the testimony of Mr. Norlin, and the correspondence which passed between the parties, and the deeds themselves, to determine what contract had been entered into between the parties with reference to the sale of this land.

At the time of the trial the attorneys for defendant admitted that up to the delivery of the warranty deeds on or about September 1st, Mr. Milton J. Foreman was agent for the defendant in connection with the sale of the real estate in question in this case, and that during this period and thereafter up to and including the date hereof, Mr. A. R. Sheriff and the firm of Sheriff, Dent, Dobyns & Freeman were agents of the plaintiff. In a letter dated August 1, 1911, Mr. Milton J. Foreman, on behalf of the defendant, sent Mr. Sheriff on behalf of the plaintiff, a continuation of abstract of title to the north 100 feet of Lot 6, and to the east and west one-half of the south 65 feet of same lot. On August 7, 1911, the Chicago Title & Trust Company gave an opinion of title to the north 100 feet and the south 65 feet of Lot 6, in which it found that the defendant had a good title in said property, subject,

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among other things, "to the rights or claims of parties in possession and not shown of record and *questions of survey*." (Italics ours.) It is evident from the record that these opinions of title must at once have been sent to Sheriff, Dent, Dobyns & Freeman, for on August 8th we have a letter by that firm, addressed to Mr. Foreman, which reads as follows:

"August 8, 1911.

Col. Milton J. Foreman,
822 First Natl. Bk. Bldg.,
Chicago, Ill.

Dear Sir:—

Referring to the proposed conveyance from George W. Jackson, Incorporated, to the Frank Parmelee Company of the real estate known as 753 and 755 West Jackson boulevard, we beg to say that we will waive the survey and accept a guaranty policy in the sum of \$75,000. The policy should be issued to Frank Parmelee Company.

A letter from Chicago Title & Trust Company under date of August 7th, is herewith returned.

Yours very truly,

SHERIFF, DENT, DOBYNS & FREEMAN,
By L. L. Dent."

This letter, it will be seen, has reference to the letters from the Chicago Title & Trust Company of August 7th and which the record shows were the opinions of title hereinabove referred to. This letter clearly indicated that the question of survey set forth in the opinion given by the Chicago Title & Trust Company was waived under the condition that a guaranty policy in the sum of \$75,000 would be secured by the defendant from the Chicago Title & Trust Company in favor of the plaintiff.

The next step in the transaction, as shown by the record, was the passing of the deeds, viz., the first and second deeds, both dated August 18, 1911. There was no oral evidence submitted as to what took place between the parties between the sending of the letter

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dated August 8th and the passing of the deeds. That, however, there was an obligation of some kind incurred is clearly evident from the fact that on September 13, 1911, Mr. Foreman addressed a letter to Mr. Sheriff wherein he referred to a letter addressed by the Chicago Title & Trust Company to Messrs. Foreman, Levin & Robertson under same date. This letter was written after both deeds that passed between the parties had been placed of record, and finds title in plaintiff to the north 100 feet and to the south 65 feet of Lot 6, and the balance in Joseph Hartmann, his heirs or devisees. The letter of August 8th previously referred to waived the question of survey upon the issuance of a guaranty policy. If a survey had been made at the time of the transfer of the property in question, it would have been discovered that Lot 6 was 165 feet 11 inches long; but the letter of August 8th explains why the survey was not made, viz., plaintiff accepted in lieu thereof a guaranty policy for \$75,000. It is fair to presume, therefore, that it was by reason of acting favorably on the letter of August 8th sent to the defendant's agent by the plaintiff that the plaintiff was endeavoring to secure the guaranty policy, and that as a result of this endeavor, the opinion of title in the letter of September 13th was given by the Chicago Title & Trust Company to Mr. Foreman as agent of the defendant. The acceptance of the offer of August 8th may be further inferred from the admissions by defendant in its affidavit of merits, wherein, while it denies that defendant agreed to supply plaintiff with a policy of insurance on Lot 6, yet it admits that it agreed to supply plaintiff with a policy of insurance on the property described in the second deed. This is also admitted in the stipulation of facts already adverted to; and furthermore, in the letter of November 11, 1911, written by Mr. Foreman to Mr. Sheriff, wherein it is stated that it had agreed to furnish a guaranty policy covering the property mentioned in

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the opinion of title already set forth in the letter of August 7th by the Chicago Title & Trust Company to defendant's attorneys. From the correspondence and the action of the parties there can be no doubt that the transaction proceeded upon the theory that the guaranty policy would be issued, the only question being whether the policy was to cover the property described in the first deed or the property described in the second deed as the north 100 feet and the south 65 feet of Lot 6.

In the course of communications between the parties, counsel asked for the tax receipts, and these were supplied by defendant's representatives. The tax receipts for 1909 were two in number, and covered the north 100 feet and the south 65 feet of Lot 6, respectively. The tax receipt of July 15, 1910, was for taxes on the property described as Lot 6, and did not make any distinction between the north 100 and the south 65 feet. The property therein is treated as one piece. These tax receipts were furnished by the defendant and taxes receipted for in these receipts were paid by the defendant before the deeds were passed.

The three-story brick building covered the lot from the north end to within 12 feet of the south end, inclusive of the 11 inches in the center which was discovered by the survey as not being covered by the second deed, but was included in the first deed. It is fair to presume, therefore, that in conveying Lot 6 with the building thereon, without the exact dimensions being set forth in the description, that the defendant not only intended to but did convey 165 feet 11 inches. When on August 8th an offer was made of \$75,000 upon condition of defendant's furnishing plaintiff a guaranty policy, and as a result of which a deed was given covering Lot 6, there is no room left for any doubt that plaintiff expected to receive a guaranty policy on Lot 6, and that it had the right to receive same from the defendant; that defendant, by acting upon said letter

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and conveying the property and receiving \$75,000, in view of the facts and circumstances in evidence in this case, led the plaintiff to believe that it would furnish such a guaranty policy covering Lot 6 which would protect the title of the plaintiff as to the 11 inches not included in the second deed, and this notwithstanding the fact that a second deed was given which conveyed only the north 100 and the south 65 feet. If it had been intended that only such property was guaranteed against, there was no necessity for the first deed. We believe, the defendant having failed to furnish a guaranty policy covering Lot 6, plaintiff had the right to secure same from the Chicago Title & Trust Company. The stipulation of facts offered in evidence admitted that the price for the guaranty policy covering Lot 6 as described in the first deed was fair and reasonable. The court therefore incorrectly applied the law to the facts. In law, under the facts and circumstances in evidence, plaintiff was entitled to a guaranty policy covering Lot 6, and the judgment of the court should therefore have been for \$353.80. The case must therefore be reversed. There being no dispute on the facts, the case will not be remanded but judgment entered here for \$353.80 in favor of the plaintiff.

Judgment reversed and judgment here for \$353.80 and costs of suit.

**James Todd, Defendant in Error, v. S. Harnstrom,
Plaintiff in Error.**

Gen. No. 19,632. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. THOMAS F. SCULLY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 4, 1915.

Statement of the Case.

Action by James Todd against S. Harnstrom to recover for a balance alleged to be due on account of extra mason work, excavating and material furnished upon a building. From a judgment for \$384.70 against defendant in favor of plaintiff, defendant brings error.

Plaintiff's statement of claim set out in detail the extra mason work, excavating and material furnished for and at the request of the defendant, for the building being constructed. It further stated that the value of the said extra mason work, excavating and material was figured on the basis of prices agreed upon in the original contract, save as to a special agreement in regard to certain brick, with reference to which plaintiff claims that in order to secure an early completion of the building it was necessary to pay for 222,000 brick \$7 per thousand instead of \$6, and that defendant agreed with plaintiff to pay one-half of said advance. It set forth in detail the credits by cash payments, and also the credits by reason of allowances to the plaintiff in the use of a cheaper grade of brick for face and mantel work than had been provided for in the contract, the change in the character of the brick being made under an agreement between the plaintiff and the defendant; that after allowing all credits there was due plaintiff from defendant, because of the extra mason work, excavating and material, the sum of \$408.70. Plaintiff further set forth in his statement of

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claim that he had offered to submit his claim to one L. Ostling, mutually selected as arbitrator, but that the said Ostling neglected and refused to comply with the request of the plaintiff for arbitration of the amount due plaintiff for said extra work and material.

To this statement of claim, defendant filed an affidavit of merits wherein he set forth that the contract provided the manner in which alterations, additions or extra work should be appraised; that following the manner so provided, the valuation placed on said extra work was \$350; "*that an accounting was had between the plaintiff and defendant herein on or about October 31, 1910; that the value of all alterations, additions and extras was fixed and agreed upon at the sum of \$350; that on said date all payments and all items and matters in dispute between the parties hereto and all allowances were checked over and agreed upon, and that on said date it was found and agreed that the sum of \$250.50 was the sum then due and owing to plaintiff which said sum was on said date paid to said plaintiff.*" The affidavit of merits then concluded with the statement that defendant had paid all claims under the said contract and for extras mentioned, and that there was nothing due plaintiff.

Upon the issues presented by the affidavit of merits, defendant testified that he had informed plaintiff that the value of the extra work and material furnished was \$350. There was, however, no explanation as to how this figure was arrived at. Defendant further testified that the credits to be allowed by reason of the different quality of mantel and face brick used should have been \$337.50 (which was \$31.50 more than plaintiff had allowed on that item); that in addition to this, he mentioned to plaintiff three items aggregating \$60.50, for certain work done by him (defendant) which should have been performed by the plaintiff under the original contract; and an additional allowance on brick, of \$19.50, claimed by him; that plaintiff had

acquiesced in such credits and that an accounting on this basis showed there was due from defendant to the plaintiff the sum of \$250.50; that this accounting was had on October 31st, and that he then handed plaintiff a check for that sum; and further, that in the presence of the plaintiff on that day he made the following memorandum on the back of the original contract (defendant's exhibit 5): "Ck. Oct. 31st, 1910 in full and extras, \$250.50." Defendant also offered in evidence certain documents which contained figures which he claimed to be evidence of the accounting arrived at between the plaintiff and the defendant.

Plaintiff denied categorically the testimony of the defendant with reference to having entered into any agreement whereby all payments, items and matters in dispute were checked over and agreed on, and that there was found due and owing plaintiff the sum of \$250.50. He, moreover, denied that there ever was brought to his attention any memorandum to the extent of \$60.50 as testified to by the defendant, or that he allowed a credit to defendant for that sum. He, moreover, denied that the difference in favor of the defendant by reason of the change in the quality of face and mantel brick was \$337.50, or that there was a further allowance on brick of \$19.50; he furthermore denied that defendant in his presence called his attention to the fact that he (defendant) had made a memorandum that that check for \$250.50 was a settlement in full. The exhibits with reference to these items of \$60.50, \$19.50 and \$337.50 were all in the handwriting of defendant or his representative, and nowhere did any of these exhibits bear any writing or memorandum made by the plaintiff or his representative, save exhibit 5, which was the contract itself.

JAMES G. SKINNER and JOEL C. CARLSON, for plaintiff in error.

MEEK & McDONALD, for defendant in error.

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MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. ACCOUNT STATED, § 23*—*burden of affirmative defense*. In an action for work done and material furnished on a building, where the defendant set up in his affidavit of merits that the parties arrived at an agreement of all items and matters in dispute and that said agreement constituted an account stated and that the amount arrived at in a certain sum having been paid, the agreement constituting the account stated having been fulfilled, and that there was nothing further due plaintiff from defendant, the affidavit of merits not denying that the extra work and material had been furnished nor the value thereof, *held* that the defense relied upon constituted an affirmative one of an account stated upon which defendant had the burden of proof.

2. ASSUMPSIT, ACTION OF, § 89*—*sufficiency of evidence to support recovery*. Where there was no denial of plaintiff's itemized statement of claim either in the affidavit of merits or opening statement for the defendant, and there was an express admission that there was extra labor performed and extra material furnished, and plaintiff offered testimony tending to prove his claim as set out in a statement of claim, the only question in the case being whether there had been an accounting agreed on which constituted an account stated, evidence *held* to fully warrant the trial court's finding for plaintiff.

3. ACCORD AND SATISFACTION, § 8*—*insufficiency of evidence to establish*. In an action for work done and material furnished upon a building, evidence *held* to fail to overcome a finding for plaintiff as against a defense of an account stated and settlement.

Mary Anne Lichtenhan, Appellee, v. Prudential Insurance Company of America, Appellant.

Gen. No. 19,778.

1. INSURANCE, § 191*—*duty of insured to surrender policy for paid-up endowment or cash value*. Where an insurance policy provides that if it shall lapse or become forfeited it *may be surrendered* for a nonparticipating paid-up endowment or for a cash surrender value as indicated in a table, the language creates an

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

option requiring the exercise of the privilege of the beneficiary or insured within a certain time, so that a failure to exercise the option within the limited period of time terminates the right based on such language in the policy.

2. INSURANCE, § 191*—*futility of surrender of self-executing policy*. Where a policy provided that if it should lapse or become forfeited and be not surrendered for a paid-up endowment policy, the company would write in lieu thereof, *without any action* on the part of the insured, a nonparticipating paid-up term policy for a period indicated by a table incorporated therein, *held* the language printed in italics in the policy made that provision of the policy self-executing, so that nothing was left for the insured or beneficiary to do to get the benefit thereof.

3. INSURANCE, § 191*—*effect of provision for surrender in an otherwise self-executing policy*. Where a policy provided that in case of lapse, without any action on the part of the insured, the company would write a nonparticipating paid-up term policy as indicated by an incorporated table, the language that "the paid-up term policy will be delivered on the legal surrender of this policy," does not change the effect of the preceding provision for a self-executing automatic term policy, independent of any act on the part of the insured or beneficiary, the law not requiring the doing of a useless thing.

4. DEATH, § 9*—*elements of legal presumption of*. Where a person leaves home with the expectation of returning thereto within a short time and he remains away and his absence is unexplained and unaccounted for and no intelligence is received from him and he is not heard from, and his whereabouts cannot be ascertained although diligent search and inquiry are made in the vicinity of his home and at such places as he would be likely to go and from such persons as he would be likely to meet and know, and nothing is heard from or of him, and he remains away from his family and home for a period of seven years, a presumption arises from these facts that he is dead, unless there are other facts and circumstances shown which will rebut and overcome such presumption of death.

5. DEATH, § 9*—*sufficiency of evidence to raise legal presumption of*. In an action on an insurance policy, based on the legal presumption of death after the expiration of seven years from the time of the disappearance of the insured, evidence *held* to warrant the jury in arriving at the conclusion that he was dead.

6. DEATH, § 3*—*sufficiency of evidence to show diligent search*. In an action on a policy of insurance, inquiries made under the facts are *held* sufficient for the jury to hold that a diligent search

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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had been made such as to raise a presumption of death after the expiration of seven years from the time an insured had disappeared.

7. MUNICIPAL COURT OF CHICAGO, § 17*—*effect of reading instructions from memoranda.* Where the instructions to the jury in the Municipal Court consisted of one connected oral charge, the fact that certain paragraphs were presented to the court in writing and that the court while instructing the jury may have read from the memorandum containing such paragraphs, does not make that part of the charge a written instruction, the record expressly stating and showing that the court instructed the jury orally.

8. DEATH, § 8*—*inadmissibility of rumor without statement of source.* It is improper to give a general rumor without stating the source of the rumor to explain the disappearance of an insured, as against the presumption of death arising after the expiration of seven years.

9. DEATH, § 8*—*when rumor is admissible as showing reason for disappearance of one presumed dead.* Where the record shows that whenever a witness could give the source of his information as to a rumor as affecting the reason for the disappearance of an insured, the court permitted him to state the source thereof and the character of the rumor, *held* that the jury had before them the evidence as to the rumor, especially since the fact of the rumor was made the subject-matter of part of the oral charge of the court to the jury.

Appeal from the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 4, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. This is an action brought in the Municipal Court of Chicago on June 24, 1911, for the recovery of the amount due Mary Anne Lichtenhan, appellee (and hereinafter referred to as the plaintiff or beneficiary), on a policy of insurance issued by the Prudential Insurance Company of America, appellant (and hereinafter referred to as the defendant or the Company), on February 9, 1903, upon the life of George Henry Lichtenhan, husband of the plaintiff (and hereinafter referred to as the insured), in favor of plaintiff, his wife. Insured disappeared

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

on or about February 15, 1903, and has never been heard from since that date, but the plaintiff, who was the beneficiary in the policy, paid the premiums on same up to February 9, 1905. Suit was brought upon the assumption that the insured was dead, and that his death occurred at the expiration of the seventh year after his disappearance, his absence having been continuous and unexplained, and without any intelligence of his whereabouts having been received by friends, relatives or those with whom he would have been likely to communicate concerning his whereabouts.

The statement of claim and affidavit of merits filed by the respective parties, and the trial of the case, presented but two issues, viz.:

(1) That the plaintiff's evidence did not bring the case within the doctrine of the presumption of death after an absence of seven years; (2) that the insurance policy was not in force.

The case was tried before a court and jury, and the issue whether or not the policy was in force was concededly a question of law. The other issue was a question of fact to be determined by the jury under correct rulings as to the evidence and proper instructions.

The court held, as a matter of law, that the policy was in force, and referred the issue, on the presumption of death after an absence of seven years, to the jury. The jury determined that issue in favor of the plaintiff, and assessed her damages in the sum of \$1,162.50; the plaintiff, however, remitted the sum of \$50, and judgment was accordingly entered for \$1,112.50, from which judgment this appeal has been prosecuted.

HOYNE, O'CONNOR & IRWIN, for appellant; CARL J. APPELL, of counsel.

ROSENTHAL & HAMILL, for appellee; LEO. F. WORMSER, NICHOLAS R. JONES and CARROLL CARUTHERS, of counsel.

MR. JUSTICE PAM delivered the opinion of the court.

The substance of defendant's contention on this appeal is set forth in its brief as follows:

(1) Where a policy of insurance gives the insured the right to a paid-up term policy upon surrender of the original policy, he must make a demand for such term policy and surrender the old one before he is entitled to sue or enforce the covenants of such term policy.

(2) In order to raise the presumption of death from seven years' absence, it must be shown that it is such an unexplained absence as cannot be reasonably accounted for except on the presumption of death; and it must be shown that diligent search has been made, without avail, for the missing person. We shall consider these contentions *ad seriatim*.

In arguing its first contention, defendant insists that the policy having lapsed for failure to pay the premiums, plaintiff could only have based her action upon a clause in the policy which specified that if the policy should lapse after having been in force two years, the insured should have several options, one of which was to demand from the company, *upon the legal surrender of the old policy*, a paid-up term policy extending the insurance for five years and two hundred and thirty days from the date to which the premium had been paid; and further, that neither the insured nor his beneficiary ever exercised such option or demanded a policy, or ever surrendered the original policy, during such five-year term or thereafter, and that therefore the rights of the plaintiff as beneficiary, under the policy had been terminated.

In its brief and argument, defendant cited many cases on this point and quoted liberally from several of them, but at the oral argument, it relied in the main upon the case of *Blume v. Pittsburg Life & Trust Co.*, 263 Ill. 160, which case had been previously, by leave

of this court, added to the list of authorities cited in its brief. However, the terms of the policy, a construction of which was involved in that case, were entirely different from the terms of the policy in the case at bar, and this difference in the terms of the policies makes the decision in the case of *Blume v. Pittsburg Life & Trust Co.*, *supra*, inapplicable. The policy in the case at bar contained the following provision:

“PAID-UP ENDOWMENT POLICY OR EXTENDED INSURANCE.—If this Policy, after being in force two full years, shall lapse or become forfeited for the non-payment of any premium on the date when due, as specified on the first page hereof, or of any note given for a premium or loan made in cash on such Policy as security, or of any interest on such note or loan, it may be surrendered for a non-participating Paid-up Endowment Policy, as specified in the following table, to mature at the same time as this Policy; provided the Policy be legally surrendered to the Company within three months after the date to which premiums have been duly paid. If this Policy, having lapsed or become forfeited as above, be not surrendered for a Paid-up Endowment Policy, the Company will write in lieu of this Policy, and *without any action on the part of the insured*, a non-participating Paid-up Term Policy for the full amount insured by this Policy, such Paid-up Term Policy to be dated on the day to which premiums have been duly paid, and to continue in force for the term indicated by the following table. * * * The Paid-up Term Policy will be delivered on the legal surrender of this Policy.

“OR CASH SURRENDER VALUE.—If this Policy be legally surrendered to the Company within three months from the end of the second year from its date or any year thereafter, all premiums, required by the terms of the Policy, to the end of that year have been paid in full, the Company will pay therefor the sum indicated by the following table.”

The paragraph entitled “Paid-up Endowment Policy or Extended Insurance” provided that “If this policy,

after being in force two full years, shall lapse or become forfeited * * * it *may be surrendered* for a non-participating paid-up endowment policy" (italics ours), and further, that the old policy be legally surrendered to the Company within three months after the date to which the premiums had been duly paid. And the second paragraph, headed "Or Cash Surrender Value" also provided that if the policy be surrendered to the Company within three months from the end of the second year from its date, the premiums having been paid in full, the Company would pay a certain sum indicated in the table, as the cash surrender value of the policy.

If a recovery had been based on the aforesaid provisions in the policy (and it is conceded that it was not), then the decision relied upon by counsel in support of its contention (*Blume v. Pittsburg Life & Trust Co., supra*) would apply. The policy construed in that case contained the words "may be surrendered," and provided that it should be legally surrendered within six months, which corresponds with the provision just quoted from the policy in the case at bar, save that therein the option was to have been exercised within three months. Clearly this language created an option which gave the beneficiary or the insured a privilege, and provided further that such privilege must be exercised within a limited time; consequently the failure to exercise that option within the limited period of time terminated the right based upon such language in the policy. But the rights of the plaintiff in this case were not based upon that provision, but upon the following:

"If this policy, having lapsed or become forfeited as above, be not surrendered for a Paid-up Endowment Policy, the Company will write in lieu of this Policy, *without any action on the part of the insured*, a non-participating Paid-up Term Policy for the full amount insured by this policy, such Paid-up Term Policy to be dated on the day to which premiums have been duly

paid, and to continue in force for the term indicated by the following table." (The italics are in the original policy);

and it further provided the length of the term, based upon a table incorporated as a part of the policy. The printing of the words "without any action on the part of the insured" in italics plainly indicated that the advantage of securing a paid-up term policy after the policy had elapsed, without any action on the part of the insured, was held out as an inducement to take a policy in the form it was written. This language "without any action on the part of the insured" clearly made that provision of the policy self-executing, and there was nothing left for the insured or the beneficiary to do in order to obtain the benefit thereunder. In the case of *Blume v. Pittsburg Life & Trust Co.*, *supra*, the policy contained no such provision, consequently that case is not applicable.

Defendant contends that before it can be held liable under this provision in the policy it must first have issued a paid-up term policy, and that it was not bound to issue such paid-up term policy until a legal surrender of the policy sued on in this case had been made, basing its contention upon the following language in the policy: "The paid-up term policy will be delivered on the legal surrender of this policy." In our opinion, these words do not change the effect of the preceding language in the provision. The policy already provided that without any action on the part of the insured the Company would write a non-participating paid-up policy for the full amount for a certain period as governed by the table incorporated in the policy. This language clearly indicated that the provision was self-executing and automatic, and was not dependent upon any act of the insured or the beneficiary. The law does not favor the doing of any useless act, and the surrender of the policy would be clearly a formal act of no consequence and unessential. *Devine v. Federal*

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Life Ins. Co., 250 Ill. 203 (pp. 206, 207); *Rose v. Mutual Life Ins. Co. of New York*, 240 Ill. 45 (pp. 51, 52). The very beginning of this suit was a notice to the defendant that plaintiff was claiming the benefit of this provision in the policy. The fact was admitted that the policy had been in force two full years, and therefore the court properly held, under the provisions in the policy, that the plaintiff was entitled to a nonparticipating paid-up term policy for the full amount of this policy, for the term of five years and two hundred and thirty days; and the mere fact that the actual paid-up term policy itself had not been delivered in no way deprived the plaintiff of her right to bring her action, providing the plaintiff had maintained her contention that the insured must have been presumed dead because of his continued and unexplained absence for more than seven years, and that notwithstanding repeated inquiries, nothing had been heard or seen of him since his disappearance, by his friends, relatives or those with whom he would naturally have communicated.

This brings us to the second issue in the case as contended for by the defendant, viz., that in order to raise the presumption of death from seven years' absence, it must be shown that it is such an unexplained absence as cannot be reasonably accounted for except on the presumption of death; and it must be shown that diligent search has been made, without avail, for the missing person.

Counsel for both parties agree that the correct rule of law as to the presumption of death after a continued and unexplained absence for seven years is stated in the case of *Kennedy v. Modern Woodmen*, 243 Ill. 560, wherein it was said (p. 566):

"The law is well settled in this State that where a person leaves home with the expectation of returning thereto within a short time and he remains away and his absence is unexplained and unaccounted for and no

intelligence is received from him and he is not heard from, and his whereabouts cannot be ascertained although diligent search and inquiry are made in the vicinity of his home and at such places as he would be likely to go and from such persons as he would be likely to meet and know and nothing is heard from or of him, and he remains away from his family and home for the period of seven years, a presumption arises from these facts that he is dead, unless there are other facts and circumstances shown which will rebut and overcome such presumption of death. *Whiting v. Nicholl*, 46 Ill. 230; *Johnson v. Johnson*, 114 id. 611; *Reedy v. Millizen*, 155 id. 636; *Hitz v. Ahlgren*, 170 id. 60; *Policemen's Benevolent Assn. v. Ryce*, 213 id. 9." This has been the law in our State since the decision by Mr. Chief Justice Breese in the case of *Whiting v. Nicholl*, 46 Ill. 230, wherein he said (p. 241):

"As held by the courts of this country, the doctrine is, that a person once found to be alive, is presumed to continue to live until there be proof of the contrary. At the end of seven years from the time he was last heard of, the presumption of life ceases, and the opposite presumption of death, takes its place. The legal presumption, as we understand from the decisions quoted by appellee, establishes not only the fact of death, but also the time at which the person shall first be accounted dead. This is an arbitrary presumption, but rendered necessary on grounds of public policy, in order that rights depending upon the life or death of persons long absent and unheard of, may be settled by some certain rule."

And it has again been enumerated in the case of *Donovan v. Major*, 253 Ill. 179 (p. 182), which quotes approvingly the language in the case of *Whiting v. Nicholl*, *supra*.

Defendant contends that the evidence introduced by the plaintiff failed to set forth a state of facts which would permit the court to apply the principle of law as to the presumption of death, as set forth in the cases heretofore cited, and that the court erred in refusing

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to instruct for the defendant, both at the close of the plaintiff's case and at the close of all the evidence in the case, as requested by the defendant in written instructions.

As to this contention the question arises, did the evidence present a state of facts from which the jury could say that from the time of the disappearance of the insured his absence continued for seven years unexplained, and that though diligent efforts had been made to find him, nothing had been heard of his whereabouts by those who would naturally have heard from him if he had been alive? If so, the jury would have been entitled to indulge in the presumption of death, as stated in the case of *Donovan v. Major, supra*, which presumption was subject, however, to rebuttal by facts or circumstances sufficient to overcome it, or by a conflicting presumption.

The evidence shows that at the time of his disappearance the insured was a man about thirty-nine years of age, about six feet two or three inches tall, weighing about 225 pounds,—“a man to be noticed wherever he would be seen on the street,” as testified by one of the witnesses; further, that he had been married to the plaintiff for a period of nine years and resided with her continually in the neighborhood known as Hyde Park, and in the immediate vicinity of his place of residence at the time of his disappearance, viz., 5646 Jefferson avenue; that for many years he had been in the ice business on his own account, and at the time of his disappearance was the owner of a wagon and team of horses; that he was last seen by the plaintiff and members of his family at about ten o'clock on the morning of either the fourteenth or fifteenth of February, 1903; that on that morning he brought ice to his home as usual, and played with his children, and before leaving, he told his wife (plaintiff) that he would have \$40 for her that night, with which to pay the rent;

that he was a man of cheerful disposition, very fond of his children, and at all times a good husband; that in addition to his own children, the insured provided for the children of the plaintiff by a former marriage, who lived with him, and that he never made any complaint as to their being in the house, but cheerfully kept up the household expenses of this large family; that at the time of his disappearance the eldest daughter of the plaintiff was married and was also living with her husband at the home; that when he was last seen he was attired in his ordinary working clothes; that plaintiff, at the time of his disappearance, made inquiry of the people in the vicinity, as to his whereabouts; that when asked on cross-examination why she did not inquire the same night, she answered, "I was too sick with my baby for to go out and make inquiries;" that neither the plaintiff nor her children nor any of the neighbors in that vicinity—of whom ten or twelve took the stand—had ever heard of or from the insured from the time of his disappearance, viz., February 14 or 15, 1903; that the insured was a member of a fraternal order known as the Knights of Pythias, and one witness (McKenzie) testified that though the lodge took it up, nothing was ever heard of the whereabouts of the insured; that at one time, the plaintiff having received the information that a man answering the description of the insured had died in a hospital in St. Paul or Minneapolis, Minnesota, she addressed a letter to the chief of police of Minneapolis, inclosing a photograph of the insured, but that she received a reply stating that the man there was not the insured; that inquiry was made of the mother of the insured, who resided in the old Lichtenhan homestead at North Germantown, New York, and also of his brothers who lived in New York City, and that replies were received stating that nothing had been heard of or from him and that they knew nothing of his whereabouts; that the plaintiff for two years after his disap-

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pearance paid the premiums on the policy in question, and at the time she made the payments she informed the representative of defendant that her husband had disappeared; that on March 18, 1910, she addressed a letter to the defendant calling its attention to the fact that her husband had been absent for more than seven years, and also calling its attention to the fact that she had tried to get back what she had paid in during the first two years, but that she could not get it, having been told that the policy would carry itself for more than five years without paying any more; that to this letter a reply was received on March 24th, informing plaintiff that it was making an examination of the papers and would let her hear further; that on April 12, 1910, plaintiff received a communication from defendant, stating that in further answer to her letter of March 18th its representative would call on her, and asked that she furnish him with a photograph of the insured; that shortly thereafter a photograph was furnished the defendant; that from that period correspondence continued between plaintiff and defendant, until on December 24th she was informed that nothing could be considered by the defendant until proofs of death were submitted; that from this time on her matters in controversy were taken up by her attorneys; that considerable correspondence was had between her attorneys and the Company; that from the time of his disappearance up to and including the time of the trial below nothing had been heard as to the whereabouts of the insured. The evidence with reference to the number of children the insured and the plaintiff had at the time of his disappearance leaves one in doubt as to whether there were three children already born, or two, and another about to be born.

Tested by the admitted rule of law governing the question of the presumption of death, the state of facts presented by this testimony, in our opinion, clearly

entitled the plaintiff to the legal presumption of death, unless there were other facts and circumstances to rebut and overcome such presumption of death. Defendant contends that there were such facts and circumstances in evidence. On this contention it relies upon its evidence with reference to a certain rumor that prevailed in the community, that the insured had committed a crime against nature with a beast. It was brought out on cross-examination of some of the witnesses for the plaintiff, and on direct examination of some of the witnesses for the defendant, that they had heard that a man by the name of Redmond—the owner of the stable where the insured had kept his team of horses—had found the insured in the act of committing the alleged crime. Some of the witnesses, however, testified that they had not heard such rumor, others that it was not believed in the community. A police officer testified that, following a conversation had with Redmond on or about the time of the disappearance of the insured, he looked for the insured, but could not find him. The evidence further shows that no complaint had been filed by the said Redmond, nor was any warrant ever issued for the arrest of the insured; it further showed that Redmond, at the time of the trial, resided in Bankers, Michigan, which fact appeared from the testimony of a witness for the defendant. There was no direct positive evidence as to the commission of the alleged crime by the insured. Defendant did not see fit either to call Redmond or take his deposition, though it did take the deposition of Mary Lichtenhan, a sister of the insured, who resided in North Germantown, New York. Defendant was evidently content to rest upon the testimony as to the rumor of the commission of the crime; in fact, during the course of the trial, when objection was raised to the admission of evidence relating to this rumor, defendant promised to show that this rumor had been brought home to the insured, but the record does not disclose

any evidence tending to show that fact. Other facts relied upon by the defendant to explain the absence of the insured were: that a sister of the insured—who admitted a hostile attitude towards the plaintiff—testified that the plaintiff was of a sarcastic disposition; and also that while on a visit at the home of the insured several years prior to his disappearance she had heard from the plaintiff that the insured had disappeared once before for three or four days; and also that he had another wife living in St. Paul from whom he had not been divorced prior to his marriage to plaintiff. That such conversation ever took place was denied, however, by the plaintiff. Defendant relied further upon the fact that plaintiff had secured a decree of divorce from the insured two or three years after his disappearance.

Whether or not the aforesaid rumor, the aforesaid testimony of the sister of the insured and the fact of the divorce explained or fairly tended to explain the continued absence of the insured for seven years, was clearly a question for the jury. The jury by their verdict determined the issue presented on this question, in favor of the plaintiff, and we believe, under the evidence, that they were fully warranted in arriving at that conclusion.

Defendant further urges that the failure of the plaintiff to notify the police and insert advertisements in newspapers showed that she had not made diligent inquiry as to the whereabouts of the insured. While other persons situated as plaintiff might have followed that course, yet the failure to do so need not be regarded by the jury as conclusive evidence that she did not make diligent search; nor can we say, as a matter of law, that her failure to do so was determinative of her right to claim the legal presumption of death under the other facts and circumstances in evidence. The evidence showed that the insured disappeared suddenly; further, that there was never anything heard

in the vicinity regarding him or his whereabouts, even up to the time of the trial ten years after his disappearance; that inquiries were made. The fact that plaintiff was sick with her baby may have accounted for her failure to notify the police. No facts or circumstances in the evidence tended to show where the insured might have been or could have gone, save his last known residence in Chicago, and the home of his childhood, North Germantown, New York, where the mother of the insured still maintained the old family home. The testimony clearly showed that none of the relatives knew his whereabouts. When plaintiff heard of the death of a man in St. Paul answering the description of the insured she at once acted upon it. The insured was a man of such stature and appearance as to be easily distinguished or recognized by his many acquaintances in the vicinity where he resided, or by any of his brothers and sisters or by his family, had they ever seen or heard of him since the time of his disappearance. We are therefore of the opinion that the inquiries made under this state of facts were sufficient for the jury to hold that a diligent search had been made.

In the case of *Whiting v. Nicholl*, 46 Ill. 230, and the *Policemen's Benevolent Ass'n v. Ryce*, 213 Ill. 9, and the case of *Kennedy v. Modern Woodmen*, 243 Ill. 560, the legal presumption of death was sustained, and, in our opinion, the facts in the case at bar, measured by the facts and principles of law as laid down in the aforesaid cases, also sustain the legal presumption of death. We are therefore clearly of the opinion not only that the court would have erred to have instructed the jury to find for the defendant either at the close of the plaintiff's case or at the close of all the evidence, but further, that under the facts and circumstances in evidence in this case, the jury were fully warranted in finding the issues for the plaintiff.

There remains but the question whether or not the

court correctly instructed the jury as to the law. The instructions to the jury consisted of one connected oral charge. The record shows that they were divided into paragraphs numbered from one to fourteen. In the course of its brief, defendant makes the erroneous statement that in addition to the oral charge, the court gave the jury certain written instructions. The record shows that the subject-matter of the charge covered by paragraphs 11, 12 and 13 was presented to the court in writing, and that before reading same, defendant, by its counsel, objected thereto. The record further shows that there was no exception taken at the close of the charge. Following this in the record, we have the additional language:

“But the court overruled said objections to the foregoing instructions numbered 11, 12, 13 and 14, to which ruling of the court in overruling said objections the defendant by its attorneys duly excepted.”

Opposite this paragraph in the record is written in pencil the word “out.” The fact that these paragraphs were presented to the court in writing and that the court while instructing the jury may have read from the memorandum containing these paragraphs, does not make that part of his charge a written instruction. The record expressly states and shows that the court instructed the jury orally. It is a grave question whether or not defendant has duly preserved an exception under the law governing objections and exceptions to oral instructions. The record does not show that any specific objections were made, save those made before the jury were instructed as to the subject-matter contained in paragraphs 11, 12 and 13; and nowhere in the record is there a statement to the court indicating the reason why such portion of the charge was objectionable, so as to give the court an opportunity to correct same if there was any error. We believe the case of *Pecararo v. Halberg*, 246 Ill. 95, and cases therein cited, preclude defendant from urging

any error on this state of the record. However, we need not rely upon that point in order to dispose of defendant's contention that the court did not correctly instruct the jury on the law as applied to the facts in the case.

Defendant complains that the subject-matter of the oral charge as contained in paragraphs 11 and 12 peremptorily instructed the jury to start out with the presumption that the insured was dead, instead of telling them first to determine if there was proof sufficient to raise such presumption. Defendant contends that this instruction does not bring to the attention of the jury that the absence must be unexplained, and, furthermore, that it did not require them to regard a diligent search as a necessary element, before the legal presumption of death could be indulged in. We do not agree with counsel that the instruction contains that vice. That portion of the court's charge was but part of a connected oral charge to the jury. In paragraphs 6, 7, 8 and 9, the jury were expressly told that mere absence for seven years without having been seen or heard from by relatives or friends was not sufficient to raise the presumption of death, if the jury further believed the evidence showed good reason for the failure of the insured to communicate with his relatives or friends; furthermore, that if the jury believed from the evidence that the insured had, prior to the time he left Chicago in 1905, committed a criminal or disgraceful act and left for fear of apprehension and punishment or disgrace for committing such act, they might consider such circumstance as to whether or not it was sufficient to account for the failure of the insured to communicate with his relatives or friends; furthermore, that if they further believed from the evidence that there were reasons shown from the evidence why the insured would not want his family, relatives and friends to know his whereabouts, then the presumption of death from the absence of said party for seven years

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or more did not exist; further, they were expressly told that where a party's absence from home for more than seven years, during which time he has not been heard of by his family, relatives or friends, is explained by facts and circumstances connected with his leaving home, or the evidence showed reasons why he left home and desired to conceal himself, then there was no presumption of death because of the said absence.

We have already held that the evidence fairly tended to show that diligent inquiry had been made, and we believe the language of the charge, in view of the evidence in the case, clearly told the jury that before the legal presumption of death arose it was necessary for the plaintiff to show that diligent search or inquiry had been made. An instruction almost in the precise language of paragraph 11 of the court's charge was approved in the case of *Policemen's Benevolent Ass'n v. Ryce*, 213 Ill. 9, under a state of facts much the same as in the case at bar. On page 15 the Court said:

"The language of the instruction is substantially the same as that which has been used by this court in a number of cases. In *Hitz v. Ahlgren*, 170 Ill. 60, we said (p. 63): 'The rule in this State is, that the absence of a person for seven years from his usual place of abode or resort, and of whom no account can be given, and from whom no intelligence has been received within that time, raises the presumption that he is dead.' To the same effect is *Reedy v. Millizen*, 155 Ill. 636; *Johnson v. Johnson*, 114 id. 611."

Defendant complains of paragraph 12 of the court's charge. This was but part of a connected charge and was proper, in view of paragraphs 6, 7 and 8. *Fuller v. New York Life Ins. Co.*, 118 C. C. A. 227, 199 Fed. 897.

Defendant also complains of a part of paragraph 10. Viewed, however, in the light of the entire paragraph and as a part of a connected charge, there was no error in the giving thereof.

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Defendant further complains of paragraph 13, but we do not find any merit in such contention.

We are firmly of the opinion, after a careful consideration of the record, that the court in its one connected oral charge fairly stated to the jury the law applicable to the facts and circumstances in evidence.

Defendant also complains of rulings of the court sustaining objections to certain questions asked on cross-examination of witnesses for the plaintiff, with reference to a general rumor or talk affecting the reason for the disappearance of the insured. Evidence of this nature was held to be improper in the cases of: *Kennedy v. Modern Woodmen*, 243 Ill. 560; *Johnson v. Johnson*, 114 Ill. 611. Moreover, the record shows that whenever a witness could give the source of his information as to the rumor, the court permitted the witness to state the source thereof and the character of the rumor. The jury therefore had before them the evidence as to this rumor. This is further evident from the fact that this rumor was made the subject-matter of part of the oral charge of the court to the jury.

Finding no reversible error, the judgment of the Municipal Court will be affirmed.

Affirmed.

Mary Murphy, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 19,834. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. BENJAMIN W. POPE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 4, 1915. Rehearing denied February 16, 1915.

Murphy v. Chicago City Ry. Co., 191 Ill. App. 431.

Statement of the Case.

Action by Mary Murphy against Chicago City Railway Company to recover damages for personal injuries sustained as the result of a collision between two of defendant's cars while plaintiff was a passenger.

At the time of the accident plaintiff was seated at the rear of the car, and upon the first crash jumped up. A second crash following threw her back onto the seat causing the injuries complained of.

It was claimed in behalf of plaintiff that a retroflexion of the uterus, discovered by her physician six weeks after the accident, was caused by injuries then received. One of the defendant's physicians, who had examined her within thirty-six hours after the accident, testified to finding no evidence of pelvic disturbance or conditions indicating that a retroflexion of the uterus was present. Other witnesses in behalf of the defendant testified that her condition was the result of overwork, lack of sufficient nourishment and anemia, and that retroflexion of the uterus could not result from an injury unless the injury was of a severe crushing or piercing character; that the condition of retroflexion is usually the result of a gradual wearing down of the ligaments supporting that organ, and that it frequently occurred among overworked, overtired, under nourished and anemic women.

Plaintiff testified that prior to the accident she had been in good health, and her physician's testimony was to the effect that the condition of retroflexion found upon his examination made six weeks or two months after the accident was due to some external violence, and that such violence so weakened the uterine structures that the uterus prolapsed; and further that there was a relation between the condition of the plaintiff at the time of the trial and the accident in question.

From a judgment for plaintiff for twenty-seven hundred and fifty dollars, defendant appeals.

Philippe v. Curran et al., 191 Ill. App. 433.

CHARLES LeROY BROWN, for appellant; LEONARD A. BUSBY and JAMES G. CONDON, of counsel.

THOMAS E. ROONEY and FERDINAND GOSS, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 15*—*when condition proximate result of accident.* In an action for personal injuries sustained in a collision between cars, on one of which plaintiff was a passenger, which injuries were alleged to have resulted in a retroflexion of the uterus, the evidence was held sufficient to present a question for the jury as to whether the accident was the proximate cause of the condition found, as against defendant's claim that such condition was the result of natural causes.

2. APPEAL AND ERROR, § 1241*—*when party cannot complain of refusal of instruction.* A party presenting several instructions embodying the same proposition in varying language cannot complain because the court refused one which he considered most important where the others were given.

3. APPEAL AND ERROR, § 1514*—*when statements of counsel not prejudicial.* Statements in the closing argument of counsel for the plaintiff held not prejudicial in view of the character of a question interjected by counsel for the defendant, and the nature of the closing argument made by the latter, the amount of the verdict clearly showing that the jury were not swayed by sympathy, passion nor prejudice.

Jennie Philippe, Appellee, v. John J. Curran and Isabella Curran, Appellants.

Gen. No. 19,871. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 4, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Philippe v. Curran et al., 191 Ill. App. 433.

Statement of the Case.

Action by Jennie Philippe against John J. Curran and Isabella Curran upon bond. From a judgment for \$5,669.28 against defendants in favor of plaintiff, defendants appeal.

John J. Curran purchased a piece of real estate assumed a mortgage for \$4,000 and executed a mortgage for the purchase price of \$30,000, no cash passing. He and the other defendant entered into a penal bond to erect a building on the property within a year to cost not less than \$10,000. The building was not erected. Plaintiff purchased the property at a foreclosure sale and a deficiency decree was entered for \$5,435.49. Plaintiff then brought action to recover damages for the failure to erect on the premises foreclosed, an improvement at a cost of not less than \$10,000, as provided for in the bond.

WILLIAM A. ROGAN, for appellants.

BITHER, GOFF & FRANCIS, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*sufficiency of affidavit of merits to raise general issue.* An affidavit of merits that defendant is not liable to the plaintiff on the bond described in plaintiff's statement of claim in any sum or amount is, in effect, a plea of the general issue presenting the issues of the case in the Municipal Court, as it by *necessary* implication denies the statement of facts making up the issue presented by the plaintiff's statement of claim.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*effect of allegations of law and conclusions.* An allegation in a statement of claim in the Municipal Court that the amount of plaintiff's damages, under a bond, is fixed by a deficiency decree rendered in certain foreclosure proceedings, to foreclose a trust deed to secure the payment of a note given in part payment of the purchase price of the property

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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mentioned in the bond sued upon, is a conclusion and a statement of the law of the case.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*allegations not requiring denial*. A statement that a deficiency decree was entered in a foreclosure proceeding for a certain sum, which is the amount of the damages sustained by the plaintiff by reason of the defendant's not erecting a building in accordance with a contract and the conditions of a bond, does not constitute a statement of fact, such as to require denial in an affidavit of merits under the procedure in the Municipal Court.

4. MUNICIPAL COURT OF CHICAGO, § 13*—*matters of conjecture*. Where the statement of claim as filed in the Municipal Court alleged that if a certain building had been erected the property would have been of sufficient value to have satisfied a certain note and costs and expenses, it is merely indulging in conjecture and does not set forth a fact requiring denial in an affidavit of merits.

5. DEBT, ACTION OF, § 21*—*improper evidence of damages*. In an action on a bond conditioned to erect a building on real estate to a certain value, the admission of the deficiency decree to establish the amount due is *held* erroneous, as not constituting the measure of damages.

Ada Billings et al., v. John Burke, Executor, Appellee,
on appeal of Ella H. Sharpe, Appellant.

Gen. No. 19,968.

1. WILLS, § 192*—*necessity of specific objection to admission of transcript of evidence at probate*. An objection to the admission of a transcript of the evidence of attesting witnesses at probate should be specific in the contest of a will in chancery.

2. WILLS, § 194*—*admissibility of original transcript*. Under the Statute of Wills, ch. 148, sec. 7 (J. & A. ¶ 11548), the original transcript of the testimony of attesting witnesses to a will, when produced and properly identified, is as clearly competent as a certified copy, since no end of justice would be subserved in refusing the proof, once the record be in court.

3. WILLS, § 194*—*incompleteness of testimony as affecting admissibility of original transcript of evidence at probate*. If the original transcript of the testimony of attesting witnesses states on

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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its back it is only a partial proof in the way of a designation of a continuance for further hearing, such an unexplained designation does not change the character of the instrument competent as evidence under the Statute of Wills, ch. 148, sec. 7 (J. & A. ¶ 11548).

4. WILLS, § 195*—*weight of transcript of evidence at probate.* A transcript of the testimony of attesting witnesses in the probate of a will is in the nature of an *ex parte* declaration in a contest of a will in chancery.

5. WILLS, § 70*—*sufficiency of execution to comply with statute.* Where it clearly appears from the transcript of attesting witnesses that they were present and saw the testatrix sign the will, in their presence and that they believed the testatrix to be of sound mind and memory at the time of signing, the transcript of the record meets the requirements of the Statute of Wills, ch. 148, sec. 2 (J. & A. ¶ 11543).

6. WILLS, § 203*—*instructions as to effect of admission of transcript at probate.* An instruction that the introduction of evidence of the transcript of the testimony of the subscribing witnesses to the will, together with the purported will itself, make a *prima facie* case establishing the will, and that after a *prima facie* case has been made, the burden of proof as to the whole case is upon those who are contesting the will to prove the allegations of their bill as to the lack of testamentary capacity of the testator or as to undue influence, by a preponderance of the evidence, *held* properly given by the trial court.

7. WILLS, § 203*—*instructions inapplicable to case.* In a contest of a will in chancery, the court may refuse an instruction which is not applicable to the case at bar.

8. WILLS, § 186*—*when burden of proof rests on contestants.* On a bill in chancery to contest a will, where the will and the testimony of the subscribing witnesses given when the will is admitted to probate make a *prima facie* case of its validity for the proponents, the burden rests upon the contestants to prove their allegations by a preponderance of the evidence.

9. WILLS, § 195*—*insufficiency of evidence to overthrow will admitted to probate.* Upon a contest of a will in chancery, evidence *held* to fail to sustain by a preponderance the contention that a testatrix was of unsound mind and memory at the time of the making of a will as against the proponent's *prima facie* case made by the introduction of the will and a transcript of the testimony of attesting witnesses at probate.

10. WILLS, § 195*—*effect of interest as to weight of evidence in will contest.* Where a contract had been entered into providing for a distribution to a witness, who was not an heir, in a will con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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test, the testimony of such witness may be regarded by the jury in the light of the interest disclosed by the aforesaid contract.

11. WILLS, § 195*—*insufficiency of evidence to overthrow validity.* On a bill in chancery to contest a will evidence held to fail to show by the required preponderance that testatrix at the time of making a will acted under the restraint or under influence of the defendant.

Appeal from the Circuit Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 4, 1915. Rehearing denied February 16, 1915.

Statement by the Court. This is a bill in chancery brought in the Circuit Court of Cook county by the heirs at law of Lena Kennedy, deceased, to contest the last will and testament of the said Lena Kennedy. The grounds upon which it was sought to be set aside were, a want of testamentary capacity in the testatrix and that she was unduly influenced in the making of same by John Burke, named therein as chief beneficiary and sole executor. Upon the bill and answer, an issue at law was made up as to whether or not the instrument in writing produced under the bill was the will and testament of the said Lena Kennedy, deceased. This issue was tried by a jury who returned a general verdict in favor of the validity of the will. The court also submitted to the jury three special interrogatories to be answered by them, which the jury answered, and by their answers found specifically: (1) That the writing read in evidence was the last will and testament of the said Lena Kennedy, deceased; (2) that at the time of the execution thereof the said Lena Kennedy was of sound mind and memory; and (3) that no undue influence was exercised over the said Lena Kennedy that resulted in the making of the said purported will.

Complainants moved the court to set aside the verdict and special findings of the jury, but the court overruled said motion and complainant's motion for a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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new trial, and entered a decree upon the verdict and findings of the jury, from which decree complainant prosecuted this appeal. Hereafter we shall refer to the appellants as the complainants, and to the appellee as the defendant.

JOSEPH P. MAHONEY, for appellant; EDWIN B. BODLEY, of counsel.

DEMING & JARRETT and HAIGHT, BROWN & HAIGHT, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Though many errors were assigned, only three are argued in complainant's brief, which are as follows:

(1) That the court erred in admitting in evidence the document known as defendant's Exhibit B, because said document was not sufficiently authenticated and identified as a certificate of the oath of the witnesses at the time of the first probate, as contemplated in section 7, chapter 148, Statute of Wills (J. & A. ¶ 11548).

(2) That the trial court erred in giving a certain instruction on behalf of the defendant, and in the refusal of one offered on behalf of the complainants.

(3) That the verdict is clearly and manifestly against the weight of the evidence.

We shall discuss these points in the order named.

Section 2 of our Statute on Wills (chapter 148, p. 2376, Hurd's Revised Statutes of Illinois for 1911, J. & A. ¶ 11543) provides as follows:

"All wills, testaments and codicils * * * shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county (Probate Court in Cook County) that they were present and saw the testator or testatrix sign said will,

testament or codicil, in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same to record: *Provided*, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of said county (or Probate) court, shall be deemed sufficient to invalidate or destroy the same." (Language in parentheses is ours.)

Section 7 of the same statute, under which the contest of the will in question has arisen and the issue of law made up to be tried by the jury, provides as follows:

"* * * And in all such trials by jury as aforesaid the certificate of the oath of the witnesses at the time of the first probate, shall be admitted as evidence and to have such weight as the jury shall think it may deserve."

The document designated as defendant's Exhibit B, the admission of which in evidence by the court is assigned as error by the complainant herein, was a transcript of the testimony of the attesting witnesses at the time of the probate of the said will. An examination of defendant's Exhibit B shows that it is a transcript of evidence taken in the Probate Court of Cook county before Judge John H. Batten, acting judge, on May 17, A. D. 1900, in the matter of proof of last will and testament in the matter of the estate of Lena Kennedy, deceased. It shows that Simeon Loudonback and Annie Mahoney, the two attesting witnesses to the last will and testament, were duly sworn and testified in open court; then follows the direct and cross-examination of both. After the last question appears the following:

"Further hearing in the above entitled cause continued to June 21, at 10:30 A. M."

At the end of the transcript appears the affidavit of the stenographer who took the testimony of the wit-

nesses, sworn to before the clerk of the Probate Court. This transcript clearly shows that the evidence of the subscribing witnesses was given under oath in open court, and transcribed by the stenographer who took the same. The deputy clerk of the Probate Court took the stand and testified that defendant's Exhibit B was the testimony of the witnesses written up by the stenographer in shorthand at the time the testimony was given by the witnesses, and then typewritten by the stenographer who took the testimony; that it was the original on file, and was the only transcript of the testimony of the witnesses to the will of Lena Kennedy in the files of the Probate Court of Cook county.

The objection raised below was that no showing had been made, i. e., no proper identification of the document; furthermore, that it was incompetent, irrelevant and immaterial.

In urging their contention that the court erred in overruling their objection and admitting defendant's Exhibit B in evidence, complainants rely in the main upon the case of *Harp v. Parr*, 168 Ill. 459. In that case proof was made in the form of an affidavit, sworn to by the subscribing witnesses, instead of by questions and answers given under oath. The point made in that case was, that the court erred in admitting the original affidavits in evidence instead of certified copies thereof, urging that in section 7 (J. & A. ¶ 11548) aforementioned, the words "certificate of oath" intended that proof be made in the form of a copy of the original affidavit in the Probate Court, properly certified by the clerk of the Probate Court.

Complainants, in citing the case of *Harp v. Parr*, *supra*, no doubt wished to have it appear to this court that the objection made below was upon the basis that a certified copy by the clerk of the court, of the transcript of the testimony, was not offered in evidence instead of the original transcript itself. This authority does not, however, sustain complainants in that con-

tention. The cases of *Harp v. Parr*, *supra*, and *Potter v. Potter*, 41 Ill. 80, state that such objection is extremely technical, and not having been made below, cannot be urged on appeal; the reasoning being further apparent in the language of Chief Justice Walker in the case of *Potter v. Potter*, *supra*, (p. 83):

“The statute has made a certified copy of the affidavit evidence, but the original could prove no more or less than a copy; and, unless an objection was made that it was the original, and not a copy, when it was offered, there was no error in admitting it. The objection, however, was general, and we must presume it was intended to apply to its relevancy to the issue.”

That is true also, as we read the record, in the case at bar.

There was no specific objection made to the admission of defendant's Exhibit B. Moreover, we believe that the original transcript of the testimony of the attesting witnesses, having been produced in court and properly identified, was clearly competent. As was said in the case of *Potter v. Potter*, *supra*: “The certified copy could contain no more than the original.”

Though it be argued that the only purpose of the provision for a certified copy was to protect the records of the court that they may remain permanently in the place assigned by law for their security, yet, once they are in court, they may be used as a matter of proof. In this view, we are fortified by the case of *Stevison v. Earnest*, 80 Ill. 513, wherein Mr. Justice Scholfield said (p. 517):

“The copy is receivable in evidence, not because it is better evidence than the original, but because it is presumed the original cannot be obtained. * * * What end of justice can be subserved when the records of one court are actually present in another court, by refusing to receive them in evidence and requiring them to be returned to their proper custody, there to be copied, and then receiving the copy in evidence?”

Another objection to the admission of this transcript in evidence was that it stated on its back that it was

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but partial proof of the will. This unexplained designation did not change the nature or character of the instrument. If the proof of the will, i. e., the testimony of the attesting witnesses, did not meet the requirements of section 2 of our statute (J. & A. ¶ 11543), complainants have failed to show that fact. Our examination, however, of this transcript shows that it meets all of the requirements of said section 2. It clearly appears from the transcript of the attesting witnesses that they were present and saw the testatrix sign the said will, in their presence, and that they believed the testatrix to be of sound mind and memory at the time of signing.

In the case of *Baker v. Baker*, 202 Ill. 595, it was held that the certificate of the oath of the witnesses at the time of the first probate is an *ex parte* declaration on oath, of the attesting witnesses, required by section 2 (J. & A. ¶ 11543), *supra*; and furthermore, a transcript of the testimony of the attesting witnesses is in the nature of such an *ex parte* declaration.

We are clearly of the opinion that defendant's Exhibit B, namely, the transcript of the attesting witnesses to the will in question, was a compliance with the provision of section 2, *supra*, and under the proof in the case at bar was such a certificate of oath as was contemplated under section 7 (J. & A. ¶ 11548), *supra*, and therefore properly admitted in evidence.

The second contention of counsel for complainants was, that the court erred in the giving of a certain instruction for the defendant and in the refusing of another offered on behalf of the complainants. The instruction complained of is as follows:

"The jury are instructed that the introduction in evidence of the transcript of the testimony of the subscribing witnesses to the will, together with the purported will itself, make a *prima facie* case, establishing the will, and that after a *prima facie* case has been made the burden of proof as to the whole case is upon those who are contesting the will to prove the allega-

tions of their bill as to the lack of testamentary capacity of the testator or as to undue influence, by a preponderance of the evidence.” (Given)

In the case of *Baker v. Baker*, 202 Ill. 595, the Court said (p. 615):

“The uniform holding of this court has been that the certificate of the oaths of the witnesses on a bill in chancery to contest a will makes a *prima facie* case for the proponents. In *Pendlay v. Eaton*, 130 Ill. 69, we said (p. 71): ‘The defendant put in evidence the will and the testimony of the subscribing witnesses given when the will was admitted to probate, which was *prima facie* evidence of its validity.’” (Citing cases.)

Counsel cannot complain of an instruction that follows a principle of law that has been uniformly upheld by our Supreme Court as evidenced by the following cases: *Entwistle v. Meikle*, 180 Ill. 9; *Harp v. Parr*, *supra*; *Taylor v. Cox*, 153 Ill. 220; *Graybeal v. Gardner* 146 Ill. 337; *Wilbur v. Wilbur*, 129 Ill. 392; *Dickie v. Carter*, 42 Ill. 376. And the cases cited by counsel for complainant do not announce a different principle of law.

In refusing to give instruction No. 7, offered on behalf of the complainants, we believe the court ruled correctly, because the said instruction was clearly not applicable to the facts in the case at bar.

There remains but the contention of the complainants, that the verdict, being clearly and manifestly against the weight of the evidence, the court erred in overruling their motion to set aside the verdict and grant a new trial and in entering a decree thereon.

The issue of law made up upon the bill and answer, presented to the jury for their determination the following questions:

(1) Whether or not at the time the testatrix made the will in question she was of sound mind and disposing memory; and

(2) whether she was acting of her own free will

and accord and not by reason of the restraint or undue influence on the part of the defendant, John Burke.

We have already held that the transcript of the evidence of the attesting witnesses was properly admitted in evidence as a compliance under section 7, and that the admission of said transcript, together with the will itself, made out a *prima facie* case in favor of the validity of the will, and that the burden of proof was then upon the contestants to prove the allegations in their bill, by a preponderance of the evidence.

As to the charge that the testatrix was of unsound mind and memory at the time of the making of the will, the only evidence adduced on the part of the complainants was the testimony of Mrs. Van Deusen, the daughter of the husband of the testatrix, by a former marriage, although many other witnesses were called by the complainant; and she testified to certain facts from which complainants argue that a natural inference therefrom tended to show that the testatrix was of unsound mind and memory; most of the happenings testified to by Mrs. Van Deusen, however, occurred many years prior to the making of the will.

As against this testimony to overcome the *prima facie* case already established, there is the testimony of one of the attesting witnesses, Simeon Loudonback, who took the stand, and both on direct and cross-examination testified that at the time the will was drawn the testatrix was clear in mind, definite in purpose, and thoroughly conscious of her acts. In addition to this testimony, there is also the testimony of Dr. Todd, who attended the testatrix from January, 1900, until the time of her death in March, 1900; that he attended her about the time her will was drawn; and that he never saw anything to indicate mental derangement in the testatrix, save on the last day before her death, when uremic poisoning had set in, which brought with it a drowsiness which remained to the end; that prior to his last visit, she was of sound mind.

Clearly, on this evidence, complainants have failed to sustain by a preponderance of evidence the contention that testatrix was of unsound mind and memory at the time of the making of the will in question.

On the issue whether or not the testatrix had been unduly influenced by John Burke, the defendant herein, the complainants depended in the main on the testimony of Mrs. Nora Kennedy Van Deusen, Gertrude White, Minerva Nooks and Anna M. Wild. In our opinion, the most that can be said of the testimony of these four witnesses is, that it *tended* to support the charge that the testatrix was unduly influenced in the making of her will by the defendant. On behalf of the defendant, however, the testimony of Simeon Loudenback, Margaret Raymond, Harriet Orlean Capps, in our opinion, fairly tended to show that the testatrix was acting of her free will at the time the will was drawn and was not under any restraint or undue influence of the defendant, John Burke.

The jury might well regard with suspicion the testimony of Mrs. Van Deusen, the chief witness for complainant. On cross-examination, it developed that a contract had been entered into, providing for a distribution of whatever was recovered by reason of the successful contest of the will. Under this contract, Mrs. Van Deusen, although not entitled to any share therein by reason of heirship, was to receive one-third of the entire amount recovered as a result of the contest; one-third was to be used in paying attorneys' fees; and the remaining one-third was to be divided among six heirs at law. Under this contract Mrs. Van Deusen undertook to secure the evidence for a successful contest of the will. The jury had the right to regard her evidence in the light of her interest in the case by reason of the aforesaid contract; and further, the jury might well have received with suspicion the testimony of Anna M. Wild, which deals mainly with statements alleged to have been made to her by the defendant after this contest of the will had been begun, because of the

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inherent improbability that the defendant in a will contest would make the statements attributed to him by the said Anna M. Wild.

After a careful analysis of all the testimony upon this point, we are firmly of the opinion, not only that the complainants failed to prove by a preponderance of the evidence, as was required of them, that the testatrix at the time of the making of the will acted under restraint and undue influence of the defendant, but that the clear preponderance of the evidence showed that the testatrix at the time of the making of the will in question was acting of her free will and was not unduly influenced in the making thereof, by the defendant. We are therefore of the opinion that the jury arrived at a proper verdict and that the court properly overruled complainants' motion to set it aside.

Finding no reversible error, the judgment of the Circuit Court will be affirmed.

Affirmed.

R. P. Lamont, Trustee, Defendant in Error, v. United States Reduction Company, Plaintiff in Error.

Gen. No. 20,064. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 4, 1915.

Statement of the Case.

Action by R. P. Lamont, as trustee, against United States Reduction Company, a corporation, for rent under a written lease. From a judgment for \$207.88 against defendant in favor of plaintiff, defendant brings error.

On March 14, 1911, plaintiff leased the defendant space in a building known as the Western Electric Building, located at 410 South Clinton Street, in the city of Chicago, for a period of two years from May 1, 1911, at a rental of \$100 per month. A written lease was executed to evidence the agreement between the parties; it was negotiated through Alexander Friend, a member of the firm of Alexander Friend & Company, real estate agents. About the end of March or the beginning of April,—at least, prior to the beginning of the term of the written lease entered into between the parties—defendant discovered it needed more space. Defendant contended that because of this fact, the president and secretary (Henry Lindenberger and Leo Wenk, respectively) of defendant called at the office of Alexander Friend & Company, the renting agents of plaintiff, and took up with Mr. Alexander Friend the question of securing additional space. Both Mr. Lindenberger and Mr. Wenk testified that after having arrived at an agreement as to the exact character of the additional space to be added to what had already been rented under the written lease, Mr. Lindenberger stated to Mr. Friend that he would be willing to take the original space and the new space for a term of one year, at a monthly rental of \$125; that Mr. Friend replied that it was immaterial whether he made a lease for one or five years, and agreed that defendant should have the entire space for one year at a rental of \$125 per month; that thereupon Mr. Wenk, who had the written lease with him, handed it to Mr. Friend; that Mr. Friend took it and said: "I will mail you a new lease for a period of one year."

Mr. Friend, a witness on behalf of the plaintiff, testified that at the time the additional space was discussed, he did not remember Mr. Lindenberger being present; he stated positively, however, that he did not discuss the question with Lindenberger or state to him that he could have a lease for the old space and the additional

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space at a rental of \$125 per month for one year, but stated that he did have an interview with Mr. Wenk on this subject; that after discussing the question of space, it was agreed that the rental of the original space and the new was to be \$125 per month, and that the term of rental should be for the same period as the written lease, namely, two years, in other words, that it was merely adding \$25 to the written lease for the additional space not included in the written lease; and that he was to prepare a new lease for a term of two years, for the new arrangement, upon the delivery of which the written lease would be taken up; he furthermore denied that Wenk at any time surrendered the old lease to him, or that defendant's copy ever came into his possession; that no new lease, however, was actually drawn; defendant took possession of the original space provided under the written lease and the additional space, on May 1, 1911, and continued in actual physical possession thereof until April 30, 1912, paying during said year the sum of \$125 per month rent.

Defendant contended that the check in payment of the last month's rent contained the words "in full of lease expiring April 30, 1912." Two witnesses testified that these words were on the check before it was delivered and accepted by the plaintiff; while two witnesses for the plaintiff, through whose hands the check passed in the course of business of Alexander Friend & Company, denied that these words were on the check when it was received from the defendant.

SILBER, ISAACS, SILBER & WOLEY, for plaintiff in error;
MARTIN J. ISAACS and JAMES D. WOLEY, of counsel.

WINSTON, PAYNE, STRAWN & SHAW, for defendant in error; JAMES H. WINSTON, of counsel.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **LANDLORD AND TENANT, § 325***—*insufficiency of evidence to show surrender.* In an action for rent under a written lease where defendant claimed that the written lease had been surrendered and canceled and that a new parol agreement had been entered into, the evidence was *held* insufficient to sustain defendant's contention.

2. **EVIDENCE, § 476***—*number not determinative of weight of evidence.* The preponderance of the evidence is not necessarily determined by the number of witnesses alone, as the appearance and demeanor of the witnesses on the stand may be taken into consideration.

3. **LANDLORD AND TENANT, § 326***—*determination of question as to length of term of parol lease.* A reviewing court will not disturb the finding of the trial court on a question of fact as to whether or not a parol lease was for one or two years, unless it is clearly and manifestly against the weight of the evidence.

4. **LANDLORD AND TENANT, § 325***—*sufficiency of evidence to establish parol lease.* A finding of the trial court that parol lease was for two years, *held* not so clearly and manifestly against the weight of evidence as to require its disturbance by an Appellate Court.

5. **FRAUDS, STATUTE OF, § 96***—*when part performance of oral lease insufficient at law.* Part performance under a parol lease for two years does not operate, in an action at law, to take the lease out of the Statute of Frauds.

6. **LANDLORD AND TENANT, § 452***—*ineffectiveness of parol lease to modify written lease.* A parol lease, invalid under the Statute of Frauds, cannot operate as a waiver, surrender or cancellation of a prior written lease.

7. **LANDLORD AND TENANT, § 449***—*what constitutes surrender.* Where a lessee elects to avoid a parol lease, he cannot claim benefit of it as a consideration for the cancellation and surrender of a written lease.

8. **LANDLORD AND TENANT, § 452***—*ineffectiveness of executory parol lease to cancel written lease.* Under the contention that a parol lease is not void but only voidable, still it does not become a good consideration for the cancellation of a written lease unless it has been fully executed or put in writing, as contemplated by the agreement.

9. **LANDLORD AND TENANT, § 452***—*sufficiency of parol agreement to abrogate written lease.* A lease, even though under seal may be abrogated by parol agreement.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Margaret McDonnell, Defendant in Error, v. W. Irving Osborne et al., Receivers, Plaintiffs in Error.

Gen. No. 19,440. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed with finding of fact. Opinion filed February 24, 1915.

Statement of the Case.

Action by Margaret McDonnell against W. Irving Osborne, George G. Moore and D. B. Hanna, receivers of the Chicago & Milwaukee Electric Railway Company, to recover damages for personal injuries sustained on being struck by a train while crossing defendant's tracks with the intention of becoming a passenger upon the train inflicting the injury. From a judgment in favor of plaintiff for seventeen hundred dollars, defendant brings error.

BULL & JOHNSON, for plaintiffs in error.

McCASKILL & McCASKILL, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. RELEASE, § 26*—*when error to submit validity of release to jury.* Where a person employed as a maid in the household of an attorney was injured by one of defendant's trains, was offered a certain amount in full settlement of all claims, which was fully explained to her by her employer, who advised her to accept the settlement, and she thereupon accepted such sum and signed a release, after same had been read to her by her employer, in the absence of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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any representative of defendant, nothing having been said or done which could possibly have been construed into a trick or device to deceive, and the evidence being clear that she understood what she was signing, it was *held* error to submit the validity of the release to the jury.

2. **CARRIERS, § 422***—*when intending passenger guilty of contributory negligence.* Where a person intending to become a passenger upon an interurban train was struck by the train while attempting to cross the tracks in front of it, and her own evidence disclosed that she knew of the approach of the train and signaled it before she reached an intervening track which she was obliged to cross, and continued to look at it up to the time she was struck, having misjudged its distance and speed, it was *held* that contributory negligence was shown as a matter of law.

G. A. Crancer Company, Plaintiff in Error, v. C. P. Williams et al., Defendants in Error.

Gen. No. 19,614. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 24, 1915.

Statement of the Case.

Action of replevin by the G. A. Crancer Company, against C. P. Williams, C. L. Williams and Werner Bros. Express and Storage Company to recover a piano sold by plaintiff to C. L. Williams under a conditional sale contract which contained a provision prohibiting the removal of the piano from the residence of the purchaser in Norfolk, Nebraska, without the vendor's consent. The piano was removed without such consent and placed with the Storage Company in Chicago. Later defendant C. P. Williams brought at-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tachment proceedings against C. L. Williams, and claimed to have obtained a judgment *in rem*, and a special execution thereon under which the piano was levied on and sold, he bidding in the property and leaving it in charge of the Storage Company.

Thereupon the plaintiff commenced a replevin proceeding to recover the piano. The Storage Company was dismissed out of the case. On trial without a jury the court found that the right of possession of the property replevied was not in the plaintiff and entered judgment for one cent damages and costs in favor of C. P. and C. L. Williams and awarded the writ of *retorno habendo*, from which judgment plaintiff prosecutes error.

J. W. SUTTON, for plaintiff in error; MARTIN L. WILBORN, of counsel.

ERIC WINTERS, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. REPLEVIN, § 152*—*when joint judgment for defendants erroneous.* In a replevin proceeding by the vendor against the purchaser of personalty under a conditional sale contract and one claiming title thereto under an execution sale on judgment against such purchaser, a joint judgment for damages in favor of the defendants is erroneous, since if the execution purchaser obtained title under the execution sale he alone was damaged by the detention of the property under the replevin writ.

2. COSTS, —*when judgment in favor of nonappearing party erroneous.* A judgment for costs in favor of a defendant who entered no appearance is erroneous.

3. EXECUTION, § 206*—*when purchaser claiming under must prove judgment.* Where in an action of replevin by the vendor of personalty the defendant claims title under an execution sale upon

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a judgment against the vendee, he must prove the existence of the judgment upon which the execution issued, and proof of the execution alone will not suffice.

4. JUDGMENT, § 692*—*what evidence insufficient to prove existence of.* The introduction in evidence of the "half sheet," a term used in the Municipal Court to designate the record of its proceedings including the judgment, which consists of a jumble of letters conveying no meaning unless explained, is insufficient to prove the existence of a judgment, especially where no explanation was offered.

5. JUDGMENT, § 242*—*when entry invalid.* A record consisting of a jumble of figures conveying no meaning unless explained is invalid as an entry of judgment under *Stein v. Meyers*, 253 Ill. 199, and subsequent decisions.

6. SALES, § 436*—*rights of bona fide purchaser from vendee on conditional sale.* Where a conditional sale is made and the vendor retains the title in himself, but delivers the chattel to the vendee so as to clothe him with apparent ownership, the bona fide purchaser or execution creditor of the latter is entitled to be protected as against the claim of the original vendor.

7. EXECUTION, § 193*—*when attaching creditor becomes an execution creditor.* An attaching creditor becomes an execution creditor after sale on execution, and consequently the principles governing the rights of attaching creditors are inapplicable after sale on execution.

8. EXECUTION, § 193*—*when purchaser at own sale a bona fide purchaser.* The execution creditor of a purchaser of personalty under a conditional sale contract is not prevented from being a bona fide purchaser as against the original vendor merely because he was a purchaser at his own execution sale.

9. SALES, § 436*—*when execution creditor of vendee of conditional sale contract protected.* Where the vendor under a conditional sale contract vested the purchaser with the *indicia* of ownership he cannot, as against a bona fide purchaser on execution against the vendee under said contract, contend that since the latter had no title the execution purchaser acquired none.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Levitan Lumber Co. v. Yegendorf, 191 Ill. App. 454.

Levitan Lumber Company, Defendant in Error, v. Max Yegendorf et al., Plaintiffs in Error.

Gen. No. 19,723. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. THOMAS F. SOULLY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 24, 1915.

Statement of the Case.

Action by Levitan Lumber Company against Max Yegendorf and another to recover the sum of \$65.15, averred by the statement of claim to have been "the current market price of lumber delivered to a building of the defendant, Max Yegendorf," for which it was alleged both he and one Balonik, his contractor, promised to pay. Yegendorf's affidavit of defense alleged that the goods were not ordered by nor delivered to him, but were sold to Balonik, and that he never so promised. From a judgment for plaintiff, defendant, Yegendorf, brings error.

WILLIAM J. DILLON, for plaintiffs in error.

HELDMAN, JACKSON & GRAFF, for defendant in error;
LEWIS F. JACOBSON, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 372***—*when invalidity of contract under Statute of Frauds not considered.* Where the question as to the invalidity of an oral contract under the Statute of Frauds was not raised below, it will not be considered for the first time in the Appellate Court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. SALES, § 332*—*when judgment for value of goods sold must be reversed.* Where in an action to recover for the reasonable value of lumber alleged to have been sold and delivered to defendant there was no evidence whatever of quantity, quality or value of same, a judgment in favor of plaintiff must be reversed, there being no contention that a price was agreed upon between the parties.

3. SALES, § 327*—*what evidence insufficient to prove quantity and value of goods sold.* In an action for the reasonable value of goods alleged to have been sold to defendant, proof merely of the amount of the bill entered on plaintiff's books is insufficient to prove the quantity, quality or value of the goods sold.

B. A. Thorpe, Defendant in Error, v. Cameron-Schroth Company, Plaintiff in Error.

Gen. No. 19,806. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed with finding of fact. Opinion filed February 24, 1915.

Statement of the Case.

Action by B. A. Thorpe against Cameron-Schroth Company, a corporation, to recover a commission for procuring a tenant for defendant.

Both Thorpe and another real estate firm, J. J. Harrington & Company were authorized to procure a tenant, and both presented one Reuter's name to the defendant as a prospective tenant, the former by letter of January 7, 1913, and the latter by a letter dated January 2, 1913, each asking in his letter to be protected as to commissions in case a lease was effected. In a letter, of January 8th acknowledging receipt of Thorpe's letter, W. A. Cameron, the president of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thorpe v. Cameron-Schroth Co., 191 Ill. App. 455.

defendant, said: "We will protect you in this matter." About the middle of February, shortly after the deal was closed with Reuter through the firm of Harrington & Company, Cameron received a bill for commissions from Thorpe. Thereupon he wrote his agents, Harrington & Company, that in looking over his files he had found correspondence with Thorpe above referred to and that he had overlooked it in negotiating with Harrington & Company. No special reference was made to the fact he had also overlooked the said letter previously received from Harrington & Company.

From a judgment for plaintiff, defendant brings error.

WILLIAM A. JENNINGS, for plaintiff in error.

HENRY HORNER, for defendant in error; ARNOLD HEAP, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 88***—*when evidence insufficient to show liability for commission.* Where each of two brokers, in whose hands, property had been placed for the purpose of securing a tenant, submitted the name of the same person as a prospective tenant, each asking that he be protected as to his commissions in case a lease was effected, to which the principal assented in writing, and the deal was closed through one of them, who received the commissions, in an action by the other to recover his commissions it was held that the mere assent of the principle to protect him as to his commissions, and a subsequent letter by the principal to the successful broker that he had overlooked his correspondence with plaintiff in making the negotiations, was held insufficient in itself to show liability.

2. **BROKERS, § 37***—*when not the procuring cause.* A broker is not entitled to a commission for securing a tenant whose name he submitted to his principal, where the evidence showed that he was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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not the first to call such person's attention to the property and that all of the negotiations which culminated in the deal were conducted by another broker who was also the first to submit the property to the prospective tenant and the first to give his name to his principal.

3. **BROKERS, § 51***—*Liability for commission when property placed in hands of several brokers.* One who places his property in the hands of several brokers for the purpose of securing a tenant, in the absence of any specific agreement to the contrary, is obligated to pay commissions only to the one who was the procuring cause of the lease.

Anna M. Raxworthy and Thomas F. Hunt, Administrators, Appellees, v. C. C. Heisen, Sr., Appellant.

Gen. No. 19,978.

1. **MASTER AND SERVANT, § 856***—*when relationship of independent contractor to be determined from contract.* The question as to whether one contracting to perform certain work in the construction of a building was an independent contractor must be determined as a matter of law from the terms of the contract under which the work was to be performed.

2. **MASTER AND SERVANT, § 856***—*when relation of independent contractor established.* Contract under which one of the parties agreed to do the stone-setting on a building under construction for a stipulated sum, construed as rendering such party an independent contractor, especially under evidence that he hired, paid, controlled, directed and discharged the men employed in stone-setting, and that neither he nor they were under the direction or control of the other party to the contract or his agents.

3. **MASTER AND SERVANT, § 133***—*when duty to furnish safe place cannot be delegated to independent contractor.* The duty of a master to furnish his employee a safe place to work cannot be delegated to an independent contractor, so as to relieve him from liability.

4. **MASTER AND SERVANT, § 156***—*when master liable for injury to servant by defective instrumentality owned by independent con-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tractor. Where the owner of a building in course of construction undertook to do the work of stone-cutting, letting the work of stone-setting to an independent contractor, and an employee of the former was killed by the breaking of a guy wire supporting a derrick owned and operated by the independent contractor, thus permitting the fall of stone being hoisted, it was *held* that the master was liable, under evidence that he was in possession of the premises, and that he and his superintendent were frequently around the derrick and in a position to observe the character and condition of the guy rope, and that the defects therein were patent.

5. EVIDENCE, § 396*—*when opinions incompetent.* Opinions of witnesses having no scientific knowledge on the subject are incompetent as to the tensile strength of a steel cable.

6. APPEAL AND ERROR, § 1474*—*when admission of opinion evidence harmless.* The admission of opinions incompetent because of the lack of scientific knowledge on the subject by the witnesses giving them is harmless where their testimony conformed to that of a competent witness whose testimony was not contradicted or impeached.

7. WITNESSES, § 99*—*when administrator may call party as a witness.* In an action by an administrator for the wrongful death of an employee of the owner of a building, the plaintiff may call the codefendant of such owner, who was an independent contractor owning the defective instrumentality causing the injury, as his witness.

8. TRIAL, § 246*—*when verdict for codefendant not inconsistent.* Where in an action against the owner of a building under construction and his independent contractor, who owned and operated the defective instrumentality causing the injury, the declaration averred a state of facts showing the duty of both to have inspected the appliance, a verdict in favor of the independent contractor is not inconsistent with a verdict against the owner, independently of whether a verdict alone without judgment thereon could affect a judgment against such owner.

9. INSTRUCTIONS, § 131*—*when not erroneous as omitting essential elements.* An instruction directing a verdict for plaintiff which requires the jury to find all facts essential to liability on the part of defendant is not reversibly erroneous because it requires a finding of other additional facts not essential to the creation of such liability.

10. MASTER AND SERVANT, § 786*—*when instruction does not ignore doctrine of assumed risk.* An instruction in an action for the wrongful death of an employee, which requires the jury to find that the deceased not only did not know but "in the exercise of ordinary

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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care could not have known of the defective condition of the appliance causing injury," is not erroneous as ignoring the doctrine of assumed risk because it does not also require a finding that deceased did not have equal opportunity of knowing.

11. INSTRUCTIONS, § 65*—*when not erroneous as assuming facts.* An instruction concluding with the words "if you find all the foregoing facts from the evidence," etc., is not erroneous as assuming the existence of such facts.

12. INSTRUCTIONS, § 81*—*when not erroneous as singling out facts.* An instruction which merely recites such facts as were necessary to be proved under the averments of the declaration is not subject to criticism as unduly singling out and giving undue prominence to such facts.

13. INSTRUCTIONS, § 88*—*when not erroneous on preponderance of evidence.* An instruction directing a verdict in case the jury found "from a preponderance of the evidence" instead of "by a preponderance of the evidence" is not ground for reversal.

14. APPEAL AND ERROR, § 1533*—*when instruction harmless.* An instruction directing an assessment of damages if the jury found "the defendants or either of them was guilty of the negligence charged against them or either of them" is not ground for reversal.

15. INSTRUCTIONS, § 151*—*when refusal proper.* The refusal of an instruction covered by instructions given is not erroneous.

16. MASTER AND SERVANT, § 802*—*when instruction as to duty to warn properly refused.* In an action for the wrongful death of an employee, an instruction that the master was not bound to warn decedent of open and obvious danger is properly refused where the declaration was not predicated upon any claim to the contrary, no such question being involved in the case.

Appeal from the Circuit Court of Cook county; the Hon. S. C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded on original hearing. Affirmed on rehearing. Opinion filed February 24, 1915.

WINSTON, PAYNE, STRAWN & SHAW, for appellant;
EDWARD W. EVERETT and CHARLES J. McFADDEN, of
counsel.

DAVID K. TONE and H. M. ASHTON, for appellees.

MR. PRESIDING JUSTICE BARNES delivered the opinion
of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

This was a suit to recover damages on account of the death of appellee's intestate, Thomas Raxworthy, occasioned, as alleged in the declaration, by the negligence of appellant and his codefendant, Alexander Shand, whom the jury found not guilty. The verdict as to Shand was set aside, and the case as to him was then dismissed. This appeal is from a judgment against Heisen.

Raxworthy's death resulted from the breaking of a cable used as a guy line to the mast of a derrick, thus causing the fall of a stone that was being hoisted in the course of building construction. The derrick was used to raise cut stone into place for setting, and was owned and operated by Shand who had a contract with Heisen, the owner of the building, to do the stone-setting. The stone-cutting was done by Heisen's employees. Raxworthy was one of his stone-cutters. The stone, when drawn to the building, was unloaded between it and the sidewalk where it was cut, and then hoisted by the derrick operators into place. At the time of the accident the derrick was on the fourth floor and Raxworthy where the stone was being cut.

The declaration consists of an original and two additional counts. All are predicated on negligence in the use and permitting the use of a defective cable, described as "old, rusty, insecure and imperfect," the first count also alleging that it was "not strong enough to sustain the strain" it was subjected to. Each avers these undisputed facts: That Heisen was erecting the building; that Raxworthy was in his employ, and that Shand was the owner of the derrick and appliances, and, together with his men, operated them. The claim of joint liability rests, in the first count, on the averment that Shand and his men were under the supervision and direction of appellant in operating the derrick; in the first additional count, on the averment that they were jointly co-operating in cutting stone, hoisting and placing it in said building, and, in the second

additional count, on the averments that Shand, for a compensation paid by appellant, was engaged in hoisting and installing stone and that appellant was simultaneously engaged in chiseling and assembling it to be hoisted; that the intestate, appellant's servant, was working beneath the derrick where he was liable to be killed or injured in case the derrick cable was insufficient to withstand the strain of lifting the stone, and that these facts were known to both appellant and Shand, and not to deceased.

The agreement between Heisen and Shand was in writing and purports to have been entered into by Heisen as owner and party of the first part, and Shand as "stone-setting contractor" and party of the second part. The material parts thereof for determining the relation of the parties read: "That the party of the second part shall furnish all labor, materials, tools, derricks, power, etc., for the setting of the cut stone on the building * * * also the stone-setting contractor agrees to supply all anchors for all the cut stone set by him * * * It is understood and agreed by the owner that all stone must be fitted for the iron work by the stone-cutter contractor; also the owner agrees to furnish on the mortar boards, ready for use, all necessary mortar for stone-setting."

The contract also provides for a stipulated sum for such work, for its prompt dispatch, and that the owner may take possession and complete the work in case said contractor neglects or abandons it. A supplemental written agreement provides that Shand shall set the stone in twenty-five panels on the building providing the panel stones were delivered in front of each opening where they belonged, the cutting of stone and brick to be done by others.

The relationship between Heisen and Shand was to be determined as a matter of law from the terms of their contract (*Pioneer Fireproof Const. Co. v. Hansen*, 176 Ill. 100; *Foster v. City of Chicago*, 197 Ill. 264),

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which hardly admits of any other construction than that Shand was an independent contractor to do the stone-setting, and such construction is borne out by conclusive evidence that Shand hired, paid, controlled, directed and discharged the men employed in the stone-setting, and that neither he nor they were under the direction or control of Heisen or his agents. *Pioneer Fireproof Const. Co. v. Hansen, supra.*

Shand's status being that of an independent contractor it is unnecessary to consider questions argued and that might arise if the relationship between Heisen and Shand was that of principal and agent.

Appellees claim, however, that appellant was nevertheless liable under his duty to furnish his employee a reasonably safe place to work, and the suit was tried partly on that theory. Appellant contends that he was relieved from such liability, if the injury was the result of Shand's negligence, because the latter was an independent contractor, and cites familiar cases where, in view of such a relation, the doctrine of *respondeat superior* was held not to apply. But none of these cases was a suit by a servant against his master for failure to furnish a safe place to work where both the servant and independent contractor (also alleged to be negligent) were working on a building in the master's possession and control.

It is a well-recognized principle that the duty of a master to furnish his employee a safe place to work cannot be delegated to an independent contractor, so as to relieve him from liability. 16 Am. & Eng. Encyc. of Law, 197; Bailey on Personal Injuries, vol. 1, sec. 44; *Bernheimer Bros. v. Bager*, 108 Md. 551-561. A more difficult question is the extent of the master's liability for defective instrumentalities used by independent contractors that may endanger the safety of his employees. Our attention has not been directed to a case in this State where the question has arisen upon the combination of facts here presented. But the duty of

inspection by the master has under very similar circumstances been extended in other jurisdictions to such instrumentalities. *Jas. Griffith & Sons Co. v. Brooks*, 197 Fed. 723; *Trainor v. Philadelphia & R. R. Co.*, 137 Pa. St. 148; *Gulf, C. & S. F. Ry. Co. v. Delaney*, 22 Tex. Civ. App. 427. In each of the cases referred to, the injury, as here, resulted from the falling of a derrick by reason of its being insecurely fastened, the derrick was controlled and operated by an independent contractor, the premises were in possession of and control of the owner, and the person injured or killed was an employee of the latter engaged about the premises. We are not disposed under such a combination of circumstances to question the existence of such a duty or that the employer may be liable for a breach thereof. In the present case there was evidence of possession by the employer and that his superintendent and himself were frequently around the derrick in a position to observe the character and condition of its guy rope, and thus to know of the dangers attendant upon the use of one that was defective or insufficient. There was also evidence tending to show that the defects complained of were patent.

The theory, therefore, upon which the case was tried being tenable, we will consider certain assignments of error that relate thereto, and first those relating to the admission of improper evidence.

On the question of the insufficiency of the cable to withstand the strain put upon it, appellees called witnesses to prove the tensile properties of a hard steel cable of that size, among them two who from lack of any scientific knowledge of the subject were manifestly disqualified to give an opinion on it. Objections to their testimony and the motion to strike it out as hearsay and incompetent should have been sustained; but, inasmuch as their testimony on the subject conformed to that of a competent witness whose testimony was

not contradicted or impeached, we do not regard the error in such rulings as reversible.

Appellant urges that under the statute plaintiffs suing as administrators could not call defendant Shand as a witness. It is enough to say on that point that the statute does not prevent an administrator suing a party from calling the latter as his own witness.

Appellant also urges that the judgment cannot stand against Heisen because there was a verdict of not guilty as to Shand. Regardless of the question whether a verdict alone, without a judgment thereon, could have such effect, the position is nevertheless untenable if, as in the present case, the declaration alleges a state of facts on which each defendant may be independently liable. If it was the duty of both defendants to inspect the derrick and its supports, then there is no room for this contention, nor that negligence by appellant in that respect was not the proximate cause of the injury.

Other matters discussed in the brief, namely, whether the deceased was not guilty of contributory negligence and whether the breaking of the cable was caused by hidden or latent defects, were, under the evidence, questions of fact for the jury, and we cannot say that their verdict was manifestly against the preponderance thereof.

Complaint is also made of the giving and refusing of instructions, which we shall refer to by their respective numbers.

It is urged that instruction No. 1, given at plaintiffs' request, ignored the doctrine of assumed risk, assumed the existence of facts that were disputed, singled out and gave undue prominence to certain facts, and was ambiguous and confusing.

While it is not free from objection, we do not think it contains reversible error. It directs a verdict against Heisen for plaintiffs upon certain hypotheses, including all that were essential to the issues presented

and some that were not. In the latter respect it is objectionable. It enumerates among the hypotheses joint operation by Heisen and Shand in trimming, hoisting and setting stone, and Heisen's general supervision of such work. There not being sufficient evidence to support either of these facts, they properly had no place in the instruction. But whether they existed or not, the ground of Heisen's liability was the same in either event and depended upon neither. It depended wholly on the undisputed facts of Heisen's possession of the building and the relationship of master and servant between him and deceased, and on the controverted facts whether the cable was defective as alleged and Heisen knew or ought to have known of it, and whether deceased was ignorant of it and without equal means of knowing it, and not upon Heisen's particular relations to Shand or the latter's work. We fail to see, therefore, how, inasmuch as the jury was required to find all the facts essential to Heisen's liability, he could be injured by the requirement that they find additional and unnecessary facts.

Nor do we think the instruction ignores the doctrine of assumed risk. The cases relied upon by appellant relate to an entirely different form of instruction. In this the jury were required to find that the deceased not only did not know but "in the exercise of ordinary care could not have known" of the defective condition or insufficient strength of the guy. The complaint is that it does not also require a finding that deceased did not have equal opportunity of knowing. It is manifest that if deceased had such opportunity, then he could have known of such defects. The expression that "he could not have known" necessarily implies absence of such opportunity. Similar language in declarations has been held to negative the assumption of risk, and in such cases instructions directing a verdict if plaintiff proved his case as alleged in such a declaration have been held not to ignore the assumption of risk. *Spring-*

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field Boiler & Manufacturing Co. v. Parks, 222 Ill. 355; *James S. Kirk & Co. v. Jajko*, 224 Ill. 338; *Hagen v. Schleuter*, 236 Ill. 467; *Lake St. El. R. Co. v. Fitzgerald*, 136 Ill. App. 281.

We do not agree with appellees, however, that the question of assumed risk is not in the case, but it was properly presented to the jury in instruction No. 23, and is not ignored in the instruction under consideration.

The instruction concluded with the words "if you find all the foregoing facts from the evidence," etc. Appellant contends that the court thus assumed the existence of such facts. We do not think the jury would so understand it. It was a mere summary of the several hypotheses contained in the instruction, each of which was required to be found from the evidence.

Nor do we think the instruction properly subject to the criticism that it singles out and unduly gives prominence to certain facts. It does not come within the decisions cited on that point. With the exception of those above alluded to and held to be inconsequential, it recites only such facts as were necessary to prove under the averments of the declaration.

The objection to given instruction No. 5, which directed a verdict in case the jury found "from a preponderance of the evidence" instead of "by a preponderance of the evidence," and the objection to the given instruction No. 6, directing an assessment of damages if the jury found "the defendants or either of them was guilty of the negligence charged against them or either of them" are more hypercritical than substantial. In no event would we deem such defective expressions as sufficient ground for a reversal.

As to the refused instructions tendered by Heisen, we think neither No. 8 or 10 embodied anything pertinent to the case that was not included in other given instructions. No. 10 sought to bring before the jury as an element in the case that Heisen was not obligated

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to warn decedent of open and obvious dangers. But the declaration was not predicated upon any claim to the contrary. No such question was in the case.

Refused instruction No. 13 sought to advise the jury of the obligation of deceased under the law to exercise ordinary care for his own safety and directed a verdict for Heisen if they found from the evidence that "he failed to observe the obvious conditions around him and by reason thereof was injured." The instruction though correct in theory may properly have been rejected on account of its abstract form, but it was covered by other given instructions, notably 14 and 15.

Having carefully examined the record in the light of the authorities presented on the rehearing in this case that were not before us on the original hearing, we are constrained to believe that there is no reversible error in the case and that the judgment should be affirmed.

Affirmed.

J. T. Williams and D. H. Williams, trading as Williams & Company, Appellees, v. J. H. Flick Construction Company, Appellant.

Gen. No. 20,290. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 24, 1915. Rehearing denied March 9, 1915.

Statement of the Case.

Action by J. T. Williams and D. H. Williams, trading as Williams & Company, against J. H. Flick Construction Company, a corporation, to recover money claimed to be due under the terms of an oral contract

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between the parties. From a judgment in favor of plaintiffs for \$2,368, defendant appeals.

Defendant having a contract for construction work with a railroad company sublet certain portions of it to a firm, which, for brevity, will be referred to as the Peterson Company, and the latter in turn sublet the work to appellees. Under the contract between appellant and said Peterson Company, entered into August 4, 1911, the work was to be finished by October 26, 1911. Appellees began work under their contract about September 7th. As it proceeded, appellant complained to appellees of the little progress made and appellees complained to appellant that the conditions under which they had undertaken the work had been changed and that they were incurring losses by reason thereof. The Peterson Company was to pay appellees 17 cents a yard for moving dirt and were to receive from appellant 19½ cents a yard therefor. After several exchanges of complaints, as aforesaid, between the parties hereto, a conversation was had sometime in November between J. H. Flick, president of appellant, and J. T. Williams, one of the appellees. Testifying to the matter, Williams claimed that his firm was about to abandon its contract with the Peterson Company and that to induce appellees to remain on the job, Flick said his company would make good their losses to the extent of the difference between what they and what the Peterson Company were to be allowed for removing the dirt, namely 2½ cents a yard. Flick admitted that he made such an offer but claims that no arrangement therefor was consummated, and it appears that the contractual relations between the several parties remained unchanged; that appellees continued to work under their contract with the Peterson Company, and while they were paid therefor by appellant, the payments were so made pursuant to the Peterson Company's order, and were based upon monthly estimates of the work done prepared by the railroad company's

engineer. Flick claimed that when he made such offer to J. T. Williams, the latter was to see his brother about it; and that on November 17th, about a week afterwards, they came to his office and resumed discussion of the subjects, but that there was no actual agreement made until December 26th; and this suit seems to be predicated upon an agreement made at that time. Appellees' statement of claim is as follows:

"Plaintiffs' claim is for \$700 for estimate for dirt work done in filling and grading, and \$1500 for the loss sustained under their oral contract entered into shortly prior to December 28, 1911, at which time plaintiffs and defendant agreed that the plaintiffs were sustaining loss by reason of the fact that the work to be done was not as represented and at which time plaintiffs and defendant also agreed on the sum of \$1500 as being the loss sustained by reason of misrepresentation of said work, which loss the defendant agreed to pay the plaintiffs and \$370.12 for ten per cent. of estimate held back and \$64 for curbing, making a total of \$2834.12."

At the trial the last item was eliminated and the actual amount of the first item was shown to be \$498. The verdict and judgment were for \$2,368, evidently including the claim for losses, the amount held back and the actual sum of the December estimate, viz., \$498.

In its affidavit of merits, appellant specifically denied each and every allegation in said statement of claim, but Flick testified that in the conversation of December 26th, at which the parties to the several contracts were represented, appellees stated that their losses were \$1,500, and that he said: "I will make you a proposition. I will give you \$1,500. I will assume all your estimates. You pull off the work. We will complete it ourselves"; and at the same time the representative of the Peterson Company agreed to give back to appellant the "margins" (or profits on its contract) that appellant had paid it. Explaining what he meant by assuming estimates, he said they were statements

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by the railroad company of the amount of work done by the contractor each month and that he meant that appellant "would take them and keep them."

EDDY, WETTEN & PEGLER, for appellant.

CANNON & POAGE, for appellees.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 389*—*when question of entering into not for jury.* Where the making of an oral contract between the parties was not denied, its terms only being in dispute it is not error to refuse to submit to the jury the question whether a valid contract was entered into.

2. CONTRACTS, § 32*—*what does not show absence of meeting of minds.* Where a contract was oral and hence necessarily rested in the recollections of the parties, the fact that their recollections differed as to its terms, does not necessarily indicate that their minds did not meet.

3. INSTRUCTIONS, § 114*—*when not erroneous as not submitting entire issue.* In an action to recover money claimed to be due under a contract where the defendant practically admitted liability for a certain sum, claiming that under the terms of the contract such sum was to be in full of all claims, an instruction that the jury was to determine from the evidence what the agreement actually was, whether such sum was in full of all claims, or merely to cover certain items of plaintiffs' claims, that if they believed the former the verdict should be limited to that amount, and if they believed the latter their verdict should be accordingly, was not erroneous as permitting the jury to find the entire issue in favor of the defendant.

4. INSTRUCTIONS, § 82*—*when not erroneous as singling out party.* An instruction concretely submitting the abstract proposition that one may not defeat his own contract simply by testifying to a different recollection of its terms, held not prejudicially erroneous merely because it contained a specific reference to the defendant in that connection.

5. CONTRACTS, § 385*—*when evidence sufficient to show existence.* Where defendant sublet its contract for certain work to a subcon-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tractor who in turn sublet it to plaintiffs, who claimed that defendant, upon their complaint as to loss resulting from changes in the conditions under which they had undertaken the work, agreed to pay the amount of such loss and in addition the difference between the amount which they were to receive under their contract with the subcontractor and that which the latter was to receive from the defendant, the evidence was *held* sufficient to establish the agreement as asserted by plaintiffs.

Edmond Gorman, Administrator, Appellee, v. South Side Elevated Railroad Company, Appellant.

Gen. No. 20,311. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 24, 1915.

Statement of the Case.

Action by Edmond Gorman, as administrator, against South Side Elevated Railroad Company to recover damages for the wrongful death of David Airey, a boy sixteen years of age who was killed while a passenger on one of defendant's cars.

The train was moving north on elevated tracks, which, near the place of the accident, turn from their northerly course east and then within one-half block suddenly curve again to the north. The boy was standing on the front platform of the second car and had been standing there for many blocks. The sides of the platform were inclosed by iron gates about six feet high. Along its front edge were four upright iron stanchions supporting the canopy, one standing in each corner and the other two between them. The space be-

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tween the two in the middle was left open for passage from one car to another. From each corner stanchion to the next stanchion towards the middle was a railing about "waist high." The base of each stanchion was about one and one-half inches from the platform. At the time of the accident the boy stood near the left corner stanchion and railing, fronting towards the rear platform of the first car which was like the other in construction.

As the train moved around the curves, the relative position of adjoining platforms was, of course, almost constantly changing. As the first curve was taken, the left corner of said rear platform necessarily swung away from the car behind, and, as the next curve was taken, the other corner swung away, bringing said left corner back by a sudden, jerky and irregular movement, in the course of which the west corner stanchions came within five inches of each other. During that movement the boy's head was caught and crushed between these two stanchions.

The case was submitted to the jury on two counts of the declaration, the first charging the defendant with negligence in failing to give Airey any notice or warning of the danger of his position under such circumstances, and the second charging negligence in failure to provide a guard or device so as to protect passengers while thus standing on the platform. From a judgment for plaintiff for two thousand dollars, defendant appeals.

ADDISON L. GARDNER and CARROLL H. JONES, for appellant.

EDMUND S. CUMMINGS, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 353*—*when duty to inclose platform question for jury.* Where a boy sixteen years of age, while a passenger on defendant's train, was killed by his head being crushed between the upright stanchions supporting the canopy over the platform of the car on which he was standing, and similar stanchions on the platform of the car in front as the train rounded a curve, whether it was the duty of defendant to so inclose its platforms as to prevent an injury of that character was *held* a question for the jury.

2. CARRIERS, § 378*—*when bound to give notice to passengers on platforms of dangers arising from movement of cars rounding curve.* In an action to recover damages for the wrongful death of a passenger whose head was caught between upright stanchions supporting the canopy of the platform of the car on which he was standing and similar stanchions on the car in front, due to the lateral movement of the ends of the cars as the train rounded a curve, it was *held* that defendant was chargeable with notice of the danger and that it was its duty to give warning to passengers whom it permitted to ride on the platforms of its cars where they were exposed to such danger.

3. CARRIERS, § 428*—*when contributory negligence question for jury.* Whether a passenger on an elevated railroad train whose head was caught between upright stanchions supporting the canopy over the platform of the car on which he was standing and similar stanchions on the car in front, as the result of the lateral movement of the ends of the cars as the train rounded a curve, was guilty of contributory negligence, was *held* a question of fact for the jury.

4. CARRIERS, § 482*—*when instruction properly refused.* Where in an action against a carrier for the wrongful death of a passenger, the declaration contained no specific allegation of negligence against defendant's trainman, claimed to have been at fault, an instruction limiting the consideration of the jury to what was required of such trainman as to specific acts is properly refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Casey v. Chicago City Ry. Co., 191 Ill. App. 474.

**John D. Casey, Administrator, Appellee, v. Chicago City
Railway Company, Appellant.**

Gen. No. 20,323. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed with finding of fact. Opinion filed February 24, 1915. *Certiorari* allowed by Supreme Court.

Statement of the Case.

Action by John D. Casey, as administrator, against Chicago City Railway Company to recover damages for the death of Patrick Tracy, whose death was caused by a collision with one of defendant's cars as he attempted to cross the street from behind a car, stationary upon a parallel track. From a judgment for plaintiff for four thousand dollars, defendant appeals.

FRANKLIN B. HUSSEY and CHARLES LEROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

DARROW & BAILY, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 131*—*what evidence insufficient to show speed.* Testimony that a car "was going in a hurry," "was going fast," is insufficient to convey any definite idea of its speed when not stated in comparison with the ordinary rate of speed or some definite standard.

2. STREET RAILROADS, § 131*—*when evidence insufficient to show excessive speed.* In an action to recover damages for the death of a pedestrian who was struck by a car as he stepped upon the track,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Richter v. Village of Maywood, 191 Ill. App. 475.

on passing around the rear of a car standing upon a parallel track, it was *held* that the evidence was insufficient to show that the car inflicting the injury was being operated at excessive speed, the only witness testifying in favor of plaintiff being a woman who was just behind decedent at the time of the accident and who testified that the car "was going in a hurry," "was going fast," her testimony being contradicted by other witnesses in a better position to observe the facts.

3. STREET RAILROADS, § 131*—*when evidence insufficient to show failure to ring gong.* In an action to recover damages for the death of a pedestrian who, on passing around the rear end of a stationary car, was struck by a car proceeding in the opposite direction upon a parallel track, the evidence was *held* insufficient to show failure on the part of defendant's servants operating the car inflicting the injury to ring the gong.

4. STREET RAILROADS, § 98*—*when contributory negligence shown.* In an action to recover damages for the death of a person who, on passing around the rear end of a stationary car, was struck by a car bound in the opposite direction upon a parallel track, it was *held* that decedent was guilty of contributory negligence as a matter of law, there being nothing in the circumstances surrounding the accident to excuse him from looking, it being apparent that he did not look until too late.

Hermine Richter, Plaintiff in Error, v. Village of Maywood, Defendant in Error.

Gen. No. 18,794. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed February 24, 1915.

Statement of the Case.

Action by Hermine Richter against the Village of Maywood to recover for personal injuries sustained as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Killian v. Tesar, 191 Ill. App. 476.

the result of stepping into an unguarded hole or excavation at a street crossing. From a judgment entered on a verdict for defendant, plaintiff brings error.

CHARLES J. TRAINOR, for plaintiff in error.

JOSEPH J. SULLIVAN, for defendant in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. INSTRUCTIONS, § 129*—*when erroneous as omitting elements.* An instruction directing a verdict which does not contain all of the elements justifying such verdict is erroneous.

2. INSTRUCTIONS, § 10*—*when giving of number on same point improper.* The giving of eight instructions directing the jury's attention to the degree of care required of the plaintiff is improper since it tended to emphasize plaintiff's duty in that respect, and to create in the minds of the jury the impression that the court did not believe that plaintiff was in the exercise of due care at the time of the injury.

Carrie Killian, Administratrix, Defendant in Error,
v. Vaclav Tesar, Plaintiff in Error.

Gen. No. 19,502. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed with finding of facts. Opinion filed February 24, 1915.

Statement of the Case.

Action by Carrie Killian, administratrix of the estate of her mother, Josephine Novak, deceased, against

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Vaclav Tesar to recover on a note executed April 6, 1890, due two years after date and payable to decedent. Letters of administration were issued to plaintiff on September 7, 1912, and on September 13, 1912, the action was commenced. Plaintiff alleged that a "part payment of \$150 was made by defendant in 1905, and a new written promise to pay, dated June 29, 1912, was made by defendant to plaintiff."

The instrument relied on as constituting a new promise was as follows:

"June 29, 1912.

Dear Niece:

I am very sorry but I cannot give you any money just now, as I had taxes to pay and the street. Just as soon as I can I will settle with you.

V. TESAR."

Plaintiff claimed that the promise was in response to a letter she had written defendant demanding the money.

Defendant denied the sending of the letter, testifying that aside from a few words he was unable to write English. He also claimed that he had paid all sums due from him to the estate and set up the statute of limitations.

From a judgment for plaintiff for \$652, defendant brings error.

Q. J. CHOTT, for plaintiff in error.

JAMES W. BURKE, for defendant in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. LIMITATION OF ACTIONS, § 117*—*when evidence insufficient to show payments on note.* In an action on a note the evidence was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Levy v. Burkstrom, 191 Ill. App. 478.

held insufficient to show a payment thereon within ten years prior to the commencement of the action.

2. LIMITATION OF ACTIONS, § 117*—*when evidence insufficient to show new promise.* In an action upon a note due more than nineteen years prior to the commencement of the action, the evidence was held insufficient to show a new promise by defendant sufficient to prevent the bar of limitations.

Edward Levy, Defendant in Error, v. C. O. F. Burkstrom, Plaintiff in Error.

Gen. No. 19,657. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 24, 1915.

Statement of the Case.

Action by Edward Levy against C. O. F. Burkstrom to recover an amount claimed to be due as rent of demised premises abandoned by the defendant. On February 24, 1910, plaintiff by a written lease rented the premises in question to defendant for a period of one year commencing May 1, 1910, at a monthly rental of fifty dollars. Defendant abandoned the premises September 30, 1910. On October 3, 1910, plaintiff caused judgment by confession to be entered on the lease for the sum of seventy dollars, of this sum fifty dollars being for the October rent and the balance being an attorney's fee provided for in the lease. This judgment was subsequently paid and satisfied. On November 29, 1910, plaintiff commenced an action against defendant to recover the sum of forty dollars for damages caused the premises, and recovered judgment for five dollars which was paid and satisfied.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thereafter and on December 1, 1910, plaintiff caused judgment by confession to be entered against defendant for the sum of forty-five dollars, twenty-five dollars being for rent for half the month of November and the balance being for attorney's fees.

The order overruling defendant's motion to open the judgment was reversed in 174 Ill. App. 276. The cause was reinstated in the lower court and on trial without a jury judgment was rendered for plaintiff for twenty-five dollars, from which defendant brings error.

Plaintiff re-rented the premises November 1, 1910, for the unexpired term of the lease at the same rental, except that but twenty-five dollars was to be paid for the month of November.

OTTO G. RYDEN, for plaintiff in error.

HARRY C. LEVINSON, for defendant in error; LEO W. HOFFMAN, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 284*—*amount of recovery on re-renting of premises after abandonment by lessee.* Where owing to the condition in which a lessee abandoning the demised premises before the expiration of the lease left the premises, the lessor on re-renting the same was unable to secure from the new tenant the full amount of the monthly payment stipulated in the original lease for the first month of the new tenancy, the lessor in an action against the defaulting tenant is entitled to recover the difference between the amount paid by the new tenant and that stipulated in the original lease.

2. LANDLORD AND TENANT, § 487*—*when lessor may take possession on abandonment by lessee.* Where a tenant abandons the demised premises before the expiration of the period for which they were leased, it becomes the right and duty of the lessor to take charge of the premises, and if possible re-rent them, and thus reduce the amount of the lessee's liability.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Norcott v. Frankenburg, 191 Ill. App. 480.

**Henry F. Norcott, trading as H. F. Norcott & Company,
Defendant in Error, v. Mary S. Frankenburg,
Plaintiff in Error.**

Gen. No. 20,074. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed with finding of facts. Opinion filed February 24, 1915.

Statement of the Case.

Action by Henry F. Norcott, a broker, trading as H. F. Norcott & Company, against Mary S. Frankenburg to recover the sum of one hundred and twenty dollars commissions on a sale of certain property owned by defendant. From a judgment for plaintiff for one hundred and twenty dollars, defendant brings error.

JOHN SCHWENDEB, for plaintiff in error.

WARREN NICHOLS, for defendant in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 51*—*when not procuring cause.* In an action by a broker to recover commissions for the sale of land to a person with whom plaintiff had negotiated, but who refused at that time to purchase at the price fixed, the deal being subsequently consummated through another broker at a lower price, it was held that the evidence was insufficient to show that plaintiff was the procuring cause of the sale.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Nellie Albrecht and Moses E. Greenebaum, Trustee,
Appellees, v. Sophie Buelow et al., on appeal of
Ferdinand Becker, Appellant.**

Gen. No. 20,314.

1. **MECHANICS' LIENS, § 128***—*apportionment of liens*. Mechanics' Liens Act, 1903, sec. 16 (Hurd's R. S., ch. 82, sec. 30, J. & A. ¶ 7154), relative to incumbrances and apportionment of liens, *held* not to differ materially from the Statute of 1845, sec. 20.

2. **MECHANICS' LIENS, § 131***—*practice for distribution of proceeds*. In a foreclosure proceeding where, after it has been determined that a mechanic has a lien and in what amount, and that his lien is superior to the lien of the mortgage or trust deed as to a portion of the premises as improved, it is not necessary, though proper, for the court to determine before entering a decree of sale what proportion of the proceeds of the sale shall be paid to the lien holder and what to the mortgagee or trustee, since the court may order the proceeds of the sale to be brought in and the proper proportions may be ascertained by taking of evidence after the sale, and the taking of this evidence may be unnecessary where the property sells for enough to satisfy both liens.

3. **MECHANICS' LIENS, § 128***—*distribution in case of prior incumbrances*. In foreclosure of a trust deed, where a cross-complainant asked that he be decreed a superior lien for material furnished upon premises subsequent to the execution of the trust deed, and it appeared that such claimant had increased the value of the building in excess of the amount claimed as a lien for materials furnished, a decree, upon the recommendation of the master, entering an order of sale, finding that complainant had a "first and prior lien" on the premises for the amount due under the notes and trust deed and was "first entitled to be paid the same" out of the proceeds of the sale, and a further finding that the cross-complainant had a lien on the premises in a certain sum, subject to the lien of the complainant, and was next entitled to be paid such sum out of the proceeds, *held* erroneous since the cross-complainant had a lien paramount to that of complainant on the premises to the extent of the additional value given to said premises by improvements or repairs made by him under the Mechanics' Liens Act, 1903, sec. 16 (Hurd's R. S. ch. 82, sec. 30, J. & A. ¶ 7154).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Albrecht et al. v. Buelow, 191 Ill. App. 481.

4. MECHANICS' LIENS, § 130*—*burden of apportionment*. Where after a sale of premises under foreclosure it is found that the net proceeds were not sufficient to satisfy both the liens of the complainant under a trust deed and that of a cross-complainant under a mechanic's lien, and it becomes necessary to take further evidence to ascertain the proper proportionate amount of such proceeds to which each party is entitled, the burden of showing what amount of the proceeds the cross-complainant is first entitled to be paid upon his prior lien is upon cross-complainant, since the complainant's lien is first in point of time.

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed February 24, 1915.

Statement by the Court. On August 20, 1913, the complainants, Nellie Albrecht and Moses E. Greenebaum, trustee, filed their bill of complaint against Sophie Buelow and others to foreclose a trust deed on certain premises in Cook county owned by Mrs. Buelow, which trust deed was executed and recorded in the year 1909. The defendant, Ferdinand Becker, answered the bill and also filed a cross-bill, in which he claimed a mechanic's lien for a balance due of \$20 for certain roofing materials furnished by him to and upon the dwelling house on said premises in the year 1912, and prayed that he be decreed a lien upon the premises, superior to complainants' lien. The complainants in their answer to the cross-bill denied that Becker's alleged lien was superior to the lien of said trust deed. The cause was referred to a master in chancery to take proofs and report the same together with his conclusions thereon.

On the hearing before the master it was shown that there was due the complainant, Nellie Albrecht, as the legal holder of one principal note and certain interest notes, secured by said trust deed, the sum of \$993.69 and also the sum of \$75 as reasonable solicitor's fees.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

On behalf of the cross-complainant, Becker, it was shown that, in pursuance of a written contract made with the owner of said premises on May 11, 1912, Becker agreed to furnish said roofing materials to and upon the building on the premises for the sum of \$42; that he had furnished the same and fully performed his contract on or about May 13, 1912, and had been paid thereon the sum of \$22, and that there was still due him a balance of \$20; and that in apt time he had filed with the clerk of the Circuit Court of Cook county a statement of his claim for a lien and had paid the sum of \$1 as a filing fee. One of the witnesses called on behalf of said cross-complainant testified that the putting of said roofing materials on said house enhanced the value of said premises to the extent of \$200. No further evidence on this point was offered by either party.

The master in his report found that there was due and unpaid to the complainant, Nellie Albrecht, the sum of \$993.69, and also the sum of \$75 for solicitor's fees. He also found that Becker was entitled to a lien upon the premises for the balance of \$20, together with the further sum of \$1 for filing said statement of claim for lien, but that "such lien is second and subsequent to the lien of the complainant, Nellie Albrecht." As reasons for this last-mentioned finding he stated in his report that "upon the hearing testimony was offered on behalf of said cross-complainant that the roof placed on said house by said cross-complainant improved or increased the value of the premises in question to the extent of \$200, but no evidence was offered as to the value of said premises before said roof was applied, nor as to the value of said premises after said roof was applied, so that there is no basis in this record upon which any percentage of increase can be figured." The master further found that all material allegations of complainant's bill of complaint had been proven and

were true, and that she was entitled to the relief prayed therein. He recommended that the usual decree of foreclosure be entered in accordance with the prayer of said bill and his findings.

The cross-complainant, Becker, filed objections to the report of the master, among which are (a) that the master has found that the lien of the cross-complainant is second and subsequent to the lien of the complainant; (b) that he found that "there is no basis in this record upon which any increase can be figured," thereby, in connection with his other findings, "placing upon this cross-complainant the burden of proving to what extent the complainant's lien is a first lien, when as a matter of law the burden of proof thereof was on the complainant, and when such proof may be made after sale and prior to distribution"; and (c) that he failed and refused to find that the lien of this cross-complainant is a first lien on the improvements (superior to the lien of the complainant) "to the extent of the increased value of the improvements, caused by the labor and materials furnished by cross-complainant on said premises." The objections were overruled by the master, and after the report had been filed in court the objections were ordered to stand as exceptions.

On December 23, 1913, the court entered a decree of sale, overruling the exceptions and approving the master's report and finding that there was due the complainant, Nellie Albrecht, upon said notes and under and by virtue of the terms of said trust deed, the sum of \$993.69, and also the further sum of \$75 for solicitor's fees, or the total sum of \$1,068.69; that she had "a first and prior lien" for said sum upon said premises, and was "first entitled to be paid the same," together with interest thereon except as to said solicitor's fees, "out of the proceeds of any sale of said premises"; that there was due said cross-complainant, Becker, the sum of \$21; that he had a lien for said sum

upon the premises, subject to the lien of said complainant, and was next entitled to be paid said sum, together with interest, out of the proceeds of any sale of the premises; and the court ordered and decreed that unless the defendant, Sophie Buelow, or some of the defendants, within two days pay or cause to be paid the complainant the said sum of \$1,068.69, interest and costs, the premises be sold by the master in the usual manner, and that the master, out of the proceeds of the sale, retain his fees, etc., pay the costs, and out of the remainder pay complainant the amount found to be due her, together with interest except as to said solicitor's fees, and if such remainder be not sufficient to pay said amount and interest that he apply the same to the extent to which it may reach in satisfaction thereof, and report the amount of the deficiency, and if the remainder be more than sufficient to pay said amount and interest that he hold the surplus subject to the further order of the court, etc. To the entry of this decree the cross-complainant, Becker, immediately prayed and was allowed an appeal and the same was subsequently duly perfected.

P. R. BARNES, for appellant; W. P. QUINBY, of counsel.

JOSEPH G. STRAUS, for appellees.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

The cross-complainant, Becker, seeks by this appeal to reverse the decree and, in substance, assigns as errors that the court erred (1) in overruling the exceptions to and approving the master's report; (2) in finding that complainant had a first and prior lien for the sum found due her, and was first entitled to be paid

out of the proceeds of any sale of the premises, and that Becker's lien was subject to her lien; (3) in not finding that Becker had a first and superior lien upon the improvements on said premises, for the sum found due him, "to the extent of the increased value of such improvements" caused by the labor and materials furnished by him; (4) in decreeing distribution of the proceeds of sale before the court could ascertain whether or not such proceeds would be sufficient to pay the liens of both complainant and cross-complainant in full; and (5) in not decreeing a sale of the premises without distribution until the further order of the court and directing the master to report the proceeds of the sale to the court. It is contended that upon the coming in of such report, if it was found that such proceeds were sufficient to pay both liens in full, the court should order the proper distribution of the proceeds; that if it was found that such proceeds were not sufficient to pay both of said liens in full, the court should refer the cause back to the master to take proofs as to the value of the land at the time of the making of cross-complainant's said contract with the owner of the land, and as to the value of the land after the making of the improvements by said cross-complainant thereon, and to report his recommendations as to the proper proportionate amounts of such proceeds to be paid to complainant and cross-complainant respectively.

Section 16 of the present Mechanics' Liens Act, in force July 1, 1903 (J. & A. ¶ 7154), provides in part as follows:

"No incumbrance upon land, created before or after the making of the contract under the provisions of this act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished material shall have been satisfied, and upon questions arising between incumbrancers and lien creditors, all previous incumbrances shall be preferred to the extent of the value of the land

at the time of making the contract, * and the lien creditor *shall* be preferred to the value of the improvements erected on said premises, * and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest."

The above quoted proportion of section 16 of the present Act is substantially the same as section 20 of the "Liens" Act of 1845, and also substantially the same as section 17 of the "Liens" Act of 1874, with the exception that in both of said sections of the prior acts the words contained in the present section 16, included between the asterisks above shown, do not appear. In the "Mechanics' Liens" Act of 1895 it was provided in section 16 thereof that the lien creditors should be preferred to the extent that the market value of the land was "enhanced" by reason of the improvements, and further that where, after a trust deed or mortgage has been recorded, contracts shall be made for the improvement of the property, and the owner shall pay for labor or material in such improvement, "the enhanced value thereby given shall be treated as a fund in which the mortgagee and lien-holder shall participate *pro rata*." When the present new Act was passed in 1903 the said sections of the Acts of 1845 and 1874 were substantially re-enacted with the addition of the said clause, "and the lien creditor *shall* be preferred to the *value* of the improvements erected on said premises."

In the case of *Raymond v. Ewing*, 26 Ill. 329, 343, decided in 1861, it is said: "The deed of trust constituted a first lien upon the premises, and improvements thereon at the time the trust deed was recorded; but the statute gives the mechanics and material men liens, paramount to the trust deed, upon the improvements made by them upon the premises, and the court should have ascertained, by reference or otherwise, *the value of these improvements* as compared with the *whole value* of the premises, and given to the petitioners

in the lien suit their *due proportion of the proceeds* of the premises, according to the provisions of the statute." In the case of *Smith v. Moore*, 26 Ill. 392, 396, our Supreme Court, speaking of section 20 of the Act of 1845, said that under the section the prior incumbrancer "must look alone to the property as it was, before the mechanic's or material man's lien attached, and they must look to the improvement or materials, *unless the proceeds of the sale is sufficient to satisfy both*, or there is a surplus of either fund, which, if necessary, may be applied to the satisfaction of the other lien." See, also, *North Presbyterian Church v. Jevne*, 32 Ill. 214, 220.

In the case of *Croskey v. Northwestern Mfg. Co.*, 48 Ill. 481, decided in 1868, the above mentioned cases were cited with approval. In this *Croskey* case, a petition to establish a mechanic's lien was filed against Croskey, as the owner of the fee, and certain other parties as mortgagees. A decree was rendered, directing a sale of the premises and establishing the relative order of the liens. The decree provided, *inter alia*, that the master should take testimony and report to the court the relative value of the land and improvements, and should bring the proceeds of the sale into court, to be distributed according to the respective priorities of the liens, the court first determining the relative value of the lands and the improvements. The court said (p. 483): "By the term 'land,' in this section of the statute, must, of course, be meant the land with such improvements as there are upon it at the time of the execution of the mortgage. If, for example, the owner of unencumbered realty, with a building upon it, executes a mortgage thereon, and afterwards has *repairs* made upon the building, for which a mechanic's lien is enforced, such lien would take priority over the mortgage *only to the extent* of the *additional value* given to the property by the improvements. Thus, if, to a house and lot worth \$15,000, and subject to a mort-

gage, additions or improvements are made by the mortgagor in such mode as to make the premises worth \$18,000, the mechanics and material men engaged in making these improvements would have a prior lien to the extent of three-eighteenths of the proceeds of the sale, and the *increased market value* added to the property would measure the extent of the priority of their lien, without reference to the cost of the materials or labor actually furnished." The Court goes on to say that the lower court, in the decree of sale, had, probably from inadvertance, given the lien claimants a prior lien upon all the buildings and improvements upon the lot, although it was quite evident from the bill that the materials had been furnished for the improvement of a building already upon the ground. It also appears from the opinion that the decree of sale in said *Croskey* case, after thus establishing the extent of the lien, directed the master to make the sale, *and* to take evidence and report to the court the comparative value of the land and the improvements at the time of the sale. It further appears that it was contended that this evidence should have been taken *before rendering the decree of sale*, but the court said (p. 484): "We see no good reason for not allowing the master to take the evidence *after the sale*, and on some accounts the inquiry at that time would be more satisfactory." The court further said that the decree of sale was faulty "in not determining the relative priority of the liens, with reference to the improvements, with more precision. The court should have ascertained at what time the improvements were commenced for which the materials of complainants were furnished, and should have given to the prior mortgagees a paramount lien on the property as it stood when such improvements were commenced, and to the complainants a paramount lien on the improvements towards which they furnished materials, and should have directed the master to inquire into the comparative value of the

Albrecht et al. v. Buelow, 191 Ill. App. 481.

property before and after the improvements were made." In the case of *Howett v. Selby*, 54 Ill. 151, decided in 1870, Hall, the owner of certain premises, made improvements thereon, and various mechanics' liens attached therefor, and proceedings were commenced to enforce these liens, Howett, a prior mortgagee, being made a party defendant. Howett set up his mortgage in a cross-bill. The lower court, after hearing the proofs, found that seven twenty-fifths of the present value of the premises was the *increased* value on account of the improvements, for which the liens attached, since the execution of the mortgage; and the court decreed that the premises be sold, and that eighteen twenty-fifths of the proceeds of the sale be first applied in payment of the mortgage, and that seven twenty-fifths of the proceeds be applied in payment of said liens, and that any surplus of said seven twenty-fifths of said proceeds, after discharging said liens, be applied, first, on any balance due on said mortgage, and the remainder, if any, be paid to the owner, Hall. The decree was affirmed.

It thus appears from these cases that, under section 20 of the Act of 1845, where the owner of land improved by a building thereon, which are incumbered by a mortgage, has improvements or repairs made upon the building for which a mechanic's lien is enforced, such lien is paramount to the lien of the mortgage to the extent of the increased value of the premises by reason of the improvements or repairs. And it also appears from these cases that, after it has been determined that the mechanic has a lien, and in what amount, and that his lien is superior to the lien of the mortgage as to a portion of the premises as improved, it is not necessary, though proper, for the court to determine, before entering a decree of sale, what proportion of the proceeds of the sale shall be paid to the lien holder and what to the prior mortgagee. The

proper proportion may be ascertained by the taking of evidence after the sale. And the taking of this evidence may be unnecessary, where the property sells for enough to satisfy the lien of the mortgagee and that of the mechanic in full. Inasmuch as section 16 of the present Act does not differ materially from section 20 of the Act of 1845, we think that these rulings are applicable to the present act.

In the case of *Grundeis v. Hartwell*, 90 Ill. 324, decided after the Act of 1874 was passed, a petition was filed by Hartwell to enforce a mechanic's lien for materials furnished for the erection of a building on a lot owned by Albert and Augustus Grundeis. Rose Forrester held a first mortgage for \$15,000, and Christiana Grundeis a second mortgage for \$20,000, on the lot, and they were made parties. Each of these mortgages was a lien upon the lot before the building was erected and before the materials were furnished by Hartwell. In the decree of sale the lower court found the value of the building, but did not find the value of the lot and failed to determine the proportion of the proceeds of the sale to which the parties were entitled, and decreed that out of the proceeds of the sale the master should pay, *first*, petitioner the *whole* amount of his claim, and *then* pay the claim of Rose Forrester, and *lastly*, the claim of Christiana Grundeis. The Supreme Court held that this was error and reversed the decree and remanded the cause for further proceedings.

In the present case, it appears from the uncontradicted evidence that the roofing materials, furnished the building by the cross-complainant, Becker, had increased the value of the premises to the extent of \$200, and that he was entitled to a mechanic's lien on said premises for the sum of \$21. Yet the court, on the recommendation of the master, entered a decree of sale finding that complainant had a "first and prior lien" on the premises for the amount found due under the notes and trust deed, and was "*first* entitled to be paid

Albrecht et al. v. Buelow, 191 Ill. App. 481.

the same'' out of the proceeds of the sale, and further finding that said cross-complainant had a lien on the premises for said sum of \$21, *subject* to the lien of complainant, and was *next* entitled to be paid said sum out of said proceeds. And the court, doubtless through inadvertence, decreed that unless the defendant, Sophie Buelow, or some of the defendants, within two days, paid complainant the sum found due her, together with interest and costs (no mention being made as to paying cross-complainant the sum found due him) the premises be sold in the usual manner, and further decreed that the master out of the proceeds should first retain his fees and pay the costs, and out of the remainder should pay *complainant* the amount found due her, or so much thereof as the remainder of the proceeds allowed, and that if said remainder was more than sufficient to pay complainant (no mention being made of cross-complainant) the master should hold the surplus subject to the court's further order. The effect of this decree was that in case the premises did not sell for more than enough to satisfy the costs, fees and expenses and the sum so found due complainant in full, the cross-complainant would receive nothing, although, as appears from the evidence and by virtue of the provisions of the statute as construed by the courts, he had a paramount lien to that of complainant on the premises to the extent of the additional value given to said premises by the improvements or repairs made by him, and was first entitled to be paid, out of the net proceeds of the sale, a small amount. "The proceeds of the sale represent and stand in the place of the land and the building, and the parties have the same proportionate interest in the proceeds that they had in the property before it was sold." *Bradley v. Simpson*, 93 Ill. 93, 95.

We are of the opinion that the court erred in entering the decree appealed from. We think that in this case the court should have ordered a sale of the premises by the master and directed the master to bring the

proceeds of the sale into court, and that, after this was done, if it appeared that the net proceeds of the sale were not sufficient to satisfy in full the amount found due complainant and cross-complainant, the court should have ascertained, by reference or otherwise, the proper proportionate share of each in said net proceeds, and decreed distribution accordingly.

It is contended, in substance, by counsel for complainant that, because on the hearing before the master cross-complainant, after proving that he was entitled to a lien on the premises in the amount of \$21, and after showing that the improvements or repairs put by him on the building increased the value of the premises to the extent of \$200, did not go further and show the value of the premises both before and after the making of said improvements or repairs, and thereby disclose to the master a basis upon which could be figured the proportionate amount, to which cross-complainant would be entitled, of the proceeds of the sale of the premises, in case said proceeds would not be sufficient to satisfy the liens of both complainant and cross-complainant, the master was justified in recommending, and the court in decreeing, that complainant was first entitled to have paid to her in full the amount found due her under said notes and trust deed. In view of the opinion in the *Croskey* case, *supra*, we do not think there is merit in the contention.

If, after a sale is made of the premises here in question, it is found that the net proceeds thereof are not sufficient to satisfy both the lien of the complainant and that of the cross-complainant, and it becomes necessary to take further evidence to ascertain the proper proportionate amounts of said proceeds to which each party is entitled, we are of the opinion that complainant's lien being first in point of time, the burden of showing what amount of the proceeds cross-complainant is first entitled to be paid is upon the cross-complainant. See *Farson's Mechanics' Lien Law* 1902, sec. 121, p. 146.

Greeman Bros. Mfg. Co. v. M. L. Nelson Furn. Co., 191 Ill. App. 494.

The decree of the Superior Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Greeman Brothers Manufacturing Company for use of National Trust & Credit Company, Appellant, v. The M. L. Nelson Furniture Company, Appellee.

Gen. No. 20,327. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed with finding of facts. Opinion filed February 24, 1915. Rehearing denied March 9, 1915.

Statement of the Case.

Action by Greeman Brothers Manufacturing Company, suing for the use of National Trust & Credit Company, against The M. L. Nelson Furniture Company for money due on an alleged assignment of accounts. From a judgment against the plaintiff in favor of the defendant, plaintiff appeals.

Plaintiff's statement of claim filed in the Municipal Court of Chicago in an action of the first class in contract stated that its claim for the use of the beneficial plaintiff was for the total sum of \$2,557.77 due and owing for certain consignments of furniture sold and delivered to the defendant by the nominal plaintiff during the months of December, 1911 and January, 1912. An itemized statement showing the dates and the respective amounts of the various consignments was attached to the statement and made a part thereof. Interest was claimed on said total sum from February 1, 1912.

Greeman Bros. Mfg. Co. v. M. L. Nelson Furn. Co., 191 Ill. App. 494.

Defendant's affidavit of merits alleged that the defendant was not indebted to the nominal plaintiff or to any one else for the items and amounts as set out in said statement of claim, and that the defendant had heretofore paid to the nominal plaintiff all of the various amounts for the merchandise set out in said statement of claim, and that for said items neither the nominal plaintiff nor any one else had any claim against the defendant.

JOHN W. CREEKMUR, D. J. DEWOLFE and ROBERT G. DREFFEIN, for appellant.

BUNGE & HARBOUR, for appellee.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*requirements of Practice Act*. Under the Practice Act, ch. 110, sec. 55, (J. & A. ¶ 8592), the defendant in its affidavit of defense is required to specify the nature of its defense, and to limit the issues to be tried to the defense set out in an affidavit.

2. PAYMENT, § 27*—*burden of proof*. The burden of proving payment is upon the party pleading it.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*insufficiency of affidavit of merits to raise issues*. Where an affidavit of merits filed in the Municipal Court simply alleges that the defendant is not indebted to the plaintiff or to any one else, to the items and amounts set out in a statement of claim, and that the defendant "has heretofore paid" to the nominal plaintiff all of the various amounts for the merchandise set out in the statement of claim and that for said items neither the nominal plaintiff nor any one else has any claim against the defendant, *held* that the only defense set forth in the affidavit of merits is that of the payment, since the other allegations were mere conclusions, which did not meet with the requirements of the Practice Act, ch. 110, sec. 55 (J. & A. ¶ 8592).

4. ASSIGNMENTS, § 36*—*evidence requiring recovery on*. Where the reviewing court finds as facts that on a certain day defendant

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Galewski v. Clover Leaf Casualty Co., 191 Ill. App. 496.

became and was indebted in a certain sum to the nominal plaintiff on certain accounts due and owing for furniture sold and delivered by said nominal plaintiff to said defendant, and that on said date said nominal plaintiff sold and assigned said accounts for a valuable consideration to the beneficial plaintiff, and that said defendant received notice of said sale and assignment of said accounts, and that said defendant had not at any time since said date made any payment on said accounts or for said furniture, and that said defendant was still indebted on said accounts and for said furniture to the nominal plaintiff, *held* that a judgment in favor of defendant would be reversed and judgment entered in the Appellate Court for said sum and interest accrued.

Theofila Galewski, Appellee, v. Clover Leaf Casualty Company, Appellant.

Gen. No. 20,835. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed February 24, 1915.

Statement of the Case.

Action by Theofila Galewski against Clover Leaf Casualty Company upon an accident insurance policy. From a judgment against defendant for one thousand dollars in favor of plaintiff, defendant appeals.

The insured died on October 21, 1912, and the suit was commenced on February 18, 1913. Paragraph "A" of the policy, entitled "Specific Losses," was in part as follows:

"If *any* of the following *specific disabilities* shall result solely from *such injuries*, within 60 days from date of accident, the Association will pay in lieu of all other indemnities under this policy.

For Loss of Life.....Principal Sum,
For Loss of Both Hands by Severance
at or above the wrist.....Principal Sum,

* * * * *

For Loss of Entire Sight of One Eye, if irrecoverably lost.....1/5 Principal Sum.

The payment of all amounts for *specific disability* in Paragraph 'A' shall be made to the insured or to his Beneficiary, if surviving, or in the event of her prior death, to the legal heirs of the insured *in installments of Twenty-five Dollars on the first day of each month* until the full disability claim is paid, * * *"

The words "such injuries," as used in paragraph "A", apparently had reference to the preceding paragraph of the policy where it appeared that the insurance was "against Bodily Injuries, effected directly and independently of all other causes and solely through external, violent and accidental means (suicide whether sane or insane is not covered)."

BRADLEY, HARPER & EHEIM, for appellant; SAMUEL A. HARPER, of counsel.

S. P. DOUTHART and FRED C. SMITH, for appellees; GUERIN & BARRETT, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 110*—*effect of insurer's failure to pay instalment accrued.* In an action on an accident insurance policy, the failure or refusal of the insurer to pay the first instalment when it becomes due does not necessarily cause the entire principal sum to accrue.

2. INSURANCE, § 502*—*when policy not payable in lump sum.* Accident policy construed as providing for payment of principal sum, in case of death due to certain causes, in monthly instalments and not in a lump sum.

3. INSURANCE, § 667*—*evidence insufficient to show death by accidental means.* Where it appeared that the insured was driving in a buggy which was struck by a street car, the buggy apparently not being damaged nor the insured injured, and the insured subse-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Korn v. Chicago Railways Co., 191 Ill. App. 498.

quently drove away in the buggy, and after he had worked several days a physician was called who found him unconscious, the patient dying shortly thereafter, and the coroner's verdict introduced in evidence stated he died from septic meningitis, by extension from septic otitis media, following injuries when his buggy was struck by a street car, the testimony conflicting as to whether his death was the result in whole or in part from the injuries claimed to be due to the collision, *held* that the evidence was insufficient to support a verdict on the theory that the insured's death was caused through external, violent and accidental means.

4. PLEADING, § 200*—*operation of demurrer to admit facts only well pleaded.* Where an accident insurance policy was set out in the declaration *in haec verba*, and from such policy it appeared that only a portion of the amount claimed could be due under its terms, a demurrer will not admit the amount claimed as a fact, since it does not appear to be a fact on the whole record, apart from the rule that a demurrer does not admit the amount claimed in the declaration.

**Abe Korn, Appellee, v. Chicago Railways Company,
Appellant.**

Gen. No. 20,362. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. W. FENTIMORE COOPER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 24, 1915.

Statement of the Case.

Action by Abe Korn against Chicago Railways Company for damages for personal injuries. From a judgment for \$1,625 against defendant in favor of plaintiff, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Duggan v. Wells Bros. Co., 191 Ill. App. 499.

CHARLES L. MAHONY and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

BROWN, BROWN & BROWN, for appellee.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

DAMAGES, § 124*—*amount of verdict for broken leg and permanent injuries.* Where plaintiff sustained a fracture of the fibula of his left leg and other injuries through a fall from a street car which he was attempting to board when it started out with a jerk, and his leg was in a cast for two months and it appeared that he suffered great pain, and medical experts testified as to the accident and permanent character of the injuries, to his leg, *held*, under the evidence, a verdict for \$1,825 was not excessive.

Pat Duggan, Plaintiff in Error, v. Wells Brothers Company, Defendant in Error.

Gen. No. 19,319. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. HUGO PAM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 24, 1915

Statement of the Case.

Action by Pat Duggan against Wells Brothers Company for personal injuries received while employed in constructing a building. From a judgment on the verdict against plaintiff in favor of defendant, plaintiff brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Defendant was engaged in the construction of a building and at the time of the accident was making a trench or ditch some six or seven feet wide and sixteen feet deep. The sides of the trench were shored with perpendicular planks which were held in place by cross-timbers or drums. The material was hoisted from the trench by means of a bucket attached to a rope suspended from a windlass.

On the day of the accident and for some days prior thereto, plaintiff had been working on concrete work near the trench. At the close of the day's work on concrete he was directed by his foreman to work overtime in the trench, and was told where he could get wading boots. This was the first excavating work he had done on this building. About seven-thirty o'clock, with a fellow-workman, Conroy, plaintiff Duggan came to the trench, and his foreman said: "Boys, let's go down, and let's hurry up with the stuff." Duggan and Conroy thereupon climbed down into the trench on the drums, and Conroy, who was to dig, went into the section next south of the one in which the bucket was let down. As Conroy dug the clay he passed it between the drums to Duggan, who placed it in the bucket. When the bucket was filled Duggan signaled to the men above to hoist it. The section in which Duggan worked contained water a foot in depth, and there was a hole in the bottom where the water was about three feet deep. The bucket stood in the water while it was being filled, and not being watertight, water drained from it as it was hoisted. The easterly side of the section in which Duggan worked was partially covered with the temporary platform, there being a space of two and one-half feet square to let the bucket through, and spaces between the planks of three or four inches. The part near the western bank of the trench was uncovered.

One bucket had been filled with clay, and as it was being hoisted, Duggan stepped back towards the western

bank to escape the water falling from the bucket. While waiting for the bucket to be dumped, Duggan reached for a floating piece of board to put under his feet. At that point of time a hard object from above fell on his head and rendered him temporarily unconscious. Conroy heard his cry, and, with the assistance of the men above, lifted him out of the trench. Blood was flowing down his face from a cut in his head. He was taken to a physician's office and it was found that his skull was fractured.

No one saw the object which fell upon Duggan. But while he was in the trench the defendant moved a thirty foot steel girder by means of a derrick over the place where he was working. The girder had laid at the base of a brick wall, and was covered with broken brick and other debris. While the girder was being hoisted and moved over the windlass, one end of it struck an upright column with sufficient force to jar the ground. Loose brick and other debris were scattered along the sloping sides of the trench in a position to be knocked or pushed into the trench. Men handling the derrick, and others, who were putting electric lights into the trench, were passing along the sides of the trench at the time of the accident.

The negligence averred in four counts of the declaration in various forms was that the defendant failed to cover or protect the trench properly to prevent the loose stones and brick along the trench and over it from being brushed or shoved or dropped into the trench where plaintiff was working.

McCASKILL & McCASKILL, for plaintiff in error.

F. J. CANTY and **P. L. McARDLE**, for defendant in error; **J. C. M. CLOW**, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Duggan v. Wells Bros. Co., 191 Ill. App. 499.

Abstract of the Decision.

1. INSTRUCTIONS, § 150*—*propriety of limitation of number.* The practice of tendering to a trial court a large number of instructions is to be condemned by every sound canon of legal ethics pertaining to the trial of causes, since it tends to mislead the jury and to produce unjust results and to inject errors into the record, imposing an unnecessary burden on trial and reviewing courts.

2. NEGLIGENCE, § 187*—*sufficiency of circumstantial evidence to establish.* In an action for a fracture of the skull sustained by plaintiff, where the evidence as to what fell upon and injured him was wholly circumstantial, but there could be no doubt that a brick or some material did fall upon him from above, and from all the facts and circumstances shown by the evidence it was a fair and reasonable inference that the object would not have fallen upon him if there had been some guard around the edge of the trench to prevent loose material from being knocked or shoved into the trench by other workmen who were at work around the trench in which the plaintiff was working under orders from the defendant, or if the trench had been covered with planks, there being no such guards or covering and plaintiff not being in a position to know how extensive the work might be carried on above him, or whether any work would be carried on while he was in the excavation which would affect his safety or expose him to peril from above, *held* that a verdict in favor of the defendant was manifestly against the evidence, since defendant knew all the facts and controlled the operations above plaintiff and, if there was danger of obstacles falling upon the plaintiff as result of the operations above, it was the duty of the defendant, in the exercise of ordinary care for the plaintiff, to discontinue such work or to guard plaintiff against such danger, the neglect on the part of the defendant to discharge this duty being shown by the evidence.

3. MASTER AND SERVANT, § 137*—*what degree of care required of employer in building construction.* In an action by an employee for personal injuries received while working upon the construction of a building, *held* erroneous to instruct the jury that where a servant works at a particular place under orders from his superior, the master is not bound to take more care of the servant than the servant is bound to take of himself.

4. MASTER AND SERVANT, § 137*—*rule as to safe place to work as applied to building construction.* In an action for personal injuries by an employee engaged in constructing a building, an instruction that the jury might find for the defendant if they find that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nix v. Brunswick-Balke-Collender Co., 191 Ill. App. 503.

inferences in favor of a pure accident are reasonable and logical, whether such inferences were supported by a preponderance of the evidence or not, *held* erroneous, since it was the duty of the defendant to exercise reasonable care to provide the plaintiff with a reasonably safe place in which to work, the defendant having ordered the plaintiff to work in the trench and the work which plaintiff was doing in the trench not creating any danger or making any changes in the risk of plaintiff's work as it progressed.

5. MASTER AND SERVANT, § 137*—*when safe place to work rule applies to building construction*. An instruction to the jury that the general rule of law which ordinarily obliges the master to exercise ordinary care to furnish a servant with a reasonably safe place in which to work does not apply in cases where the work the servant is employed to do is in connection with construction and demolition of buildings, if of such a nature that the character of the surroundings and situation is continually changing, *held* misleading as applied to the evidence in the case.

6. MASTER AND SERVANT, § 410*—*where negligent order immaterial*. In an action to recover for personal injuries received by an employee in connection with the construction of a building, where the negligence averred in certain counts of the declaration was the failure of the defendant to place any covering or protection over an excavation to prevent loose stone and other material being knocked or pushed or dropped into it while the plaintiff was working therein, *held* that the court erred in instructing the jury that under such counts of the declaration plaintiff must prove a negligent order to entitle him to recover.

Adolph Nix, Plaintiff in Error, v. Brunswick-Balke-Collender Company, Defendant in Error.

Gen. No. 19,592. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed February 24, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nix v. Brunswick-Balke-Collender Co., 191 Ill. App. 503.

Statement of the Case.

Action by Adolph Nix against Brunswick-Balke-Collender Company, a corporation, to recover for personal injuries. The substantive facts are stated in *Brunswick-Balke-Collender Co. v. Nix*, 138 Ill. App. 559, on a former appeal. From a judgment upon a verdict in favor of defendant, plaintiff brings error.

The plaintiff, a boy of seventeen years of age, was employed by the defendant on a lathe which for temporary purposes was fitted up for boring small holes in the side of stoppers to be fastened to wires and used in keeping the counts in billiards. There were thirty-three counters made to every one stopper. The holes bored in the side of the stopper were for the purpose of inserting a screw by which the stopper was made rigid on the wire. The lathe was ordinarily used for another purpose, and was prepared for the purpose of boring these holes by the insertion of a wooden plug into the spindle on the lathe. The spindle was made of metal with an opening at the outside and which was five-eighths inches in diameter and tapered down towards the end that went into the lathe head. The inside of the spindle was smooth, not threaded, and the plug was not threaded. The plug was held in the spindle only by being firmly driven into the end of the spindle. The plug contained a gimlet or bit which bored the holes. Fitted out in this way, the lathe was operated by steam, connected by belts and pulleys to a power shaft which caused the bit or gimlet to be revolved at the rate of 3,300 to 4,000 revolutions per minute. The machine had no regular attachment to place on it for use in boring holes. It was in reality an automatic woodcutting machine, and was used only occasionally for the use to which it was devoted when the plug flew out of the spindle and destroyed one of plaintiff's eyes.

The evidence of the plaintiff tended to show that the plug, when fastened into the spindle the last time be-

fore the accident, extended into the spindle a distance of only one-half to five-eighths of an inch. The defendant's evidence tended to show that the plug extended into the spindle anywhere from one to two and one-half inches.

Plaintiff had used the machine about four times before he was hurt, or only about fifteen hours covering a period of about three weeks. He never set the plug into the spindle himself. The plug had to be set exactly true and was set by Schwartz, a skilled wood turner. The defendant's foreman told Schwartz to set the plug for plaintiff and he did so on each occasion. The plug was set by driving it in tight to secure it, hammering the sides and turning the belt until it was exactly true. On August 10, 1901, the plug and bit which it contained flew out of the end of the shaft in which it was held, striking the plaintiff in the eye. He at that time was not engaged in boring a piece of wood, but was reaching for a piece to be bored when the wooden plug with the bit flew out of its socket. On August 9th, the day before the accident, plaintiff went to Schwartz, as directed by the general foreman, and told him that he had some boring to do and requested him to place the plug in the spindle. Schwartz put it in and the plug came out after being used a while and fell upon the floor. Plaintiff went to Schwartz and told him that the plug had come out and Schwartz put it in again, saying, "It is all right. It won't come out again," and thereupon plaintiff resumed the use of the machine, and was shortly thereafter injured. Schwartz was a skilled wood turner, and testified that he drove the plug into the hole in the lathe in such a manner that the bit would run perfectly true and that it required skill to do it.

B. J. WELLMAN and RICHARD J. FINN, for plaintiff in error; GEORGE H. FOSTER, of counsel.

Nix v. Brunswick-Balke-Collender Co., 191 Ill. App. 503.

P. L. McARDLE and F. J. CANTY, for defendant in error; J. C. M. CLOW, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1526*—*immateriality of erroneous instructions where verdict proper*. If, in an action for personal injuries, a verdict of not guilty is sustained by the evidence, errors in instructions upon plaintiff's appeal become immaterial, since he has no right of action upon the evidence or the law applicable thereto.

2. INSTRUCTIONS, § 10*—*where unnecessarily numerous*. The practice of tendering numerous instructions, where only a few are needed to properly submit the issues to the jury, is to be condemned as tending to mislead the jury and to bring error into the record, apart from placing an unnecessary burden upon trial and reviewing courts.

3. MASTER AND SERVANT, § 690*—*when master liable for defective machine*. Where it appeared that plaintiff, who was seventeen years of age was working at a machine under the direction of defendant's foreman and he was struck in the eye by a plug and bit flying out of a shaft, after it had been secured by a skilled workman delegated by defendant to set it aright, and after he had been assured by him that it was in proper condition, *held* that a verdict in favor of defendant was against the weight of the evidence.

4. MASTER AND SERVANT, § 363*—*necessity of obvious danger for assumption of risk*. In an action for loss of an eye through being struck by a plug and bit flying off of a spindle upon which plaintiff was at work, where it did not appear that he knew the plug might become loose and fall out of the spindle, and he was ordered to do the work by the foreman and a skilled workman, delegated by defendant to insert and adjust the plug, who assured him that the plug was in proper condition for use, and it did not appear that plaintiff, a boy seventeen years of age, with little experience in the particular kind of work, knew that the flying out of the plug was an ordinary risk and danger incident to the work, or that he was competent to comprehend and appreciate the risks and dangers, an instruction that plaintiff could not recover if the injury was the result of a danger which he appreciated or which he should have appreciated, *held* erroneous, the risk and danger of employment being not open and obvious under the proof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nix v. Brunswick-Balke-Collender Co., 191 Ill. App. 503.

5. MASTER AND SERVANT, § 782*—*necessity of basing instruction as to assumed risk on the evidence.* In an action for personal injuries sustained by reason of being struck in the eye by a plug and bit flying out of a spindle at which plaintiff was employed, an instruction ignoring an order to do the work and the assurance of defendant's properly delegated skilled workman that it was in proper condition, and assuming that there was evidence tending to show that the plaintiff appreciated and understood the danger of the plug's flying out in the operation of the machine, and that such danger was open and obvious to the plaintiff, *held* erroneous.

6. MASTER AND SERVANT, § 782*—*instructions as to assumed risk.* In an action against a master for injuries to an eye struck with a plug flying from a spindle at which plaintiff worked, an instruction to the jury that if they found from the evidence that a lathe and plug had been in use by the plaintiff from the time he was first employed by the defendant, and that whatever danger was involved in the use of the same was obvious and patent to the observation of any person of ordinary intelligence, age and experience of plaintiff, and that the condition of the lathe and plug remained the same during the entire time of the service of the plaintiff in and about the same, and if the jury further found from the evidence that the plaintiff was a person of ordinary intelligence for one of his age and capable of understanding and appreciating the conditions and dangers involved in the use of the lathe and plug, then they were instructed that the plaintiff assumed the risk involved in the use of the same and could not recover, *held* erroneous, since plaintiff, under the evidence, only worked at the lathe, not to exceed fifteen hours in all, on four different occasions in the course of one year's employment, and since it did not take into consideration the order to do the work and the assurance of defendant's properly delegated agent that the machine had been put in good working condition.

7. MASTER AND SERVANT, § 782*—*where instructions improper as to assumed risk.* In an action for personal injuries, an instruction to the jury that if they believed from the evidence that the plaintiff, by giving ordinary care and attention to things about him and to the mechanism and operation of the machine, should have known and understood that there was a possibility that a bit in question might become loose in the socket of the spindle and fly out of that socket while the spindle was in motion, then the plaintiff assumed the risk and the jury should find the defendant not guilty, *held* objectionable and misleading for want of evidence on which to base it, and in that it stated the plaintiff assumed the risk on the mere possibility that the bit and plug in question might fly out of the socket, no account being given to the effect of the specific order to do

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Foster Drug Co. v. Zeller & Sons Co., 191 Ill. App. 508.

the work and the assurance of a skilled and properly authorized employee that the plug and bit were in proper condition after being set.

8. MASTER AND SERVANT, § 698*—*evidence insufficient to show assumption of risk.* In an action for injuries received from the flying off of a plug in the operation of a machine, where there was no evidence that the employee knew or should have known that the plug might fly out and injure him, although he had seen it drop out on the floor when it was replaced by one properly authorized with the assurance of one qualified to know that it was all right and would not come out again, *held* there was no basis in the evidence for the jury to find that the danger of the plug's flying out was so obvious and patent that a seventeen-year-old boy could know and appreciate the danger to which he was exposed or to justify the giving of instructions on the question of assumed risk.

9. MASTER AND SERVANT, § 777*—*when instruction misleading as not based on evidence.* Where there was no evidence furnishing a basis for a "simple accident" theory embodied in a peremptory instruction, *held* that such instruction was misleading in its effect upon the jury.

Foster Drug Company, Defendant in Error, v. Zeller & Sons Company, Plaintiff in Error.

Gen. No. 19,668. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 24, 1915.

Statement of the Case.

Action by Foster Drug Company, a corporation, against Zeller and Sons Company, a corporation, to recover the invoice price of goods returned. From a judgment for \$84.15 against defendant in favor of plaintiff, defendant brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Plaintiff bought silverware of defendant for \$127. The written contract contained the following provision:

"If proposition is unsatisfactory after six months' trial, all goods on hand to be repurchased by Zeller & Sons Co., Inc., Chicago, Ill., at original invoice price."

Upon being reminded by defendant that if plaintiff desired to avail itself of the repurchase provision of the contract it must first pay for the goods, plaintiff sent a check for the original purchase price, with an indorsement thereon substantially as follows:

"This check is given in payment of invoice dated July 28, 1911, for silverware, and is given with the distinct understanding that the firm Zeller & Sons Company * * * will repurchase the remainder of all the original purchase as per above dated invoice of silverware remaining on hand February 15, 1912, at the original invoice price. The acceptance of this check is an acceptance of the above conditions.

FOSTER DRUG Co.,
per M. M. LYONS."

Defendant accepted and cashed the check.

ALBERT O. OLSON, for plaintiff in error; JAMES J. LEAHY, of counsel.

HOYNE, O'CONNOR & IRWIN, for defendant in error; CARL J. APPELL, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. DEPOSITIONS, § 38*—*grounds for suppression*. Where a deposition is taken upon oral interrogatories propounded by the commissioner in person to the witness, a motion to suppress the deposition on such a ground is not well taken under Hurd's R. S. ch., 51, sec. 30 (J. & A. ¶ 5547).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Foster Drug Co. v. Zeller & Sons Co., 191 Ill. App. 508.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*insufficiency of defense as ground for striking affidavit of merits*. Portions of an affidavit of merits filed in the Municipal Court may be stricken where the same do not present a defense to the action.

3. APPEAL AND ERROR, § 1488*—*effect of improper evidence where other evidence sufficient to sustain court's finding*. Where it was contended that the trial court erroneously admitted a letter from defendant to plaintiff and the invoice of articles thereon referred to, without any proof that the letter was properly addressed and mailed, with postage prepaid, or that it was received by the plaintiff, *held* that even if the evidence was improperly admitted it would not constitute reversible error, since it will be presumed that the trial court disregarded any improper evidence when there is sufficient competent evidence to justify the finding of the court on a trial without a jury.

4. DEPOSITIONS, § 42*—*waiver of insufficiency of foundation for introduction of letter*. The objection that a trial court improperly admitted a letter from defendant to plaintiff and an invoice of articles therein referred to, without any proof that the letter was properly addressed and mailed, with postage prepaid, or was received by plaintiff, cannot be taken advantage of where such evidence was in a deposition and the objection was not raised before the trial.

5. SALES, § 199*—*effect of delivery to carrier to pass title to consignee*. Where the purchaser of goods delivers the same to a carrier for transportation to the seller under an express contract providing for the return of the same, the title to the goods passes to the consignee when they are delivered to such carrier.

6. SALES, § 430*—*waiver of right to object to return of goods*. In an action for the invoice price for goods returned under the provisions of an express contract providing for the return of the same, where defendant's agent testified that defendant was prepared to repurchase the goods as soon as it had an opportunity to inspect them, and that it had at all times been prepared to accept the goods as soon as it had an opportunity to inspect and had been given the information as to the quantity and quality on hand, the refusal of the goods upon such ground by the consignee was a waiver of all other grounds of which the consignee then had knowledge, such as the claim that they should not have been shipped by express.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jens Jacobsen, Petitioner, Plaintiff in Error, v. City of Chicago et al., Defendants in Error.

Gen. No. 19,784. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed February 24, 1915.

Statement of the Case.

Proceedings for writ of mandamus by Jens Jacobsen against the City of Chicago, the Fire Marshal and the Civil Service Commission to reinstate petitioner as driver in the fire department in said City and to place petitioner's name on the pay roll of said department. From a judgment denying the writ of mandamus the petitioner brings error.

The petitioner held the position of driver in the fire department of the City of Chicago under certification and appointment under the terms of the Civil Service Act, on September 19, 1910. On that day, on account of the illness of his wife, he applied to the Fire Marshal for a leave of absence for a year. The Fire Marshal advised the petitioner that he could not grant leave of absence for more than thirty days at a time, but that he would extend his leave from time to time. The petitioner thereupon obtained leave of absence for a period of thirty days from September 19, 1910, and removed with his family to Indiana, where he had leased a farm. On October 19, 1910, he made application for extension of his leave of absence for another period of thirty days. The extension was allowed but the petitioner received no notice thereof, and made no further application for extension of his leave of absence or claim for reinstatement to his office or position until he returned to Chicago on or about August 15, 1911.

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Jacobsen v. City of Chicago, 191 Ill. App. 511.

He was then informed that his resignation had been accepted on October 25, 1910.

It appeared that Driscoll, battalion chief over Jacobsen, and Capt. Strook, not being informed that the Fire Marshal had extended Jacobsen's leave of absence, investigated the action of Jacobsen, and Capt. Strook went to Jacobsen's farm near Valparaiso, Indiana, for the purpose of making an examination and report concerning his absence. Strook did not see Jacobsen but left word with his wife that Jacobsen should either return to work or send in the city property, such as the badge, cap, insignia, etc., which belonged to the City of Chicago. Within a week thereafter the insignia of office or position were received by Capt. Strook through the mail accompanied by a letter, the contents of which do not appear in the record. Thereupon Capt. Strook made out and signed Jacobsen's resignation of his position and his name was dropped from the pay roll of the department.

WILLIAM E. RAFFERTY, for plaintiff in error.

WILLIAM H. SEXTON, for defendants in error; JOSEPH F. GROSSMAN and JOHN E. FOSTER, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. MANDAMUS, § 15*—*where ineffectual*. The granting of a writ of mandamus is descretionary with the court in view of all the existing facts and with due regard to the consequences which may result, and in the exercise of this judicial descretion the court may refuse the writ though the petitioner has a clear legal right for which mandamus is an appropriate remedy, where it can be seen that it cannot accomplish any good purpose or where it will fail to have any beneficial effect.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

2. MUNICIPAL CORPORATIONS, § 147*—*where laches precludes mandamus for officer's reinstatement.* Where a petitioner had been advised that a leave of absence could not be granted for a period longer than thirty days at a time from his position as an officer in the fire department of the City of Chicago and a period of over fifteen months elapsed between the time of his removal and the day of his filing a petition for a writ of mandamus for reinstatement, and no excuses or justification for his long absence from duty or for his ignorance that his leave of absence had not been extended were shown, *held* that the writ was properly denied because of the unreasonable delay of the petitioner in presenting his petition for the writ.

3. MUNICIPAL CORPORATIONS, § 147*—*laches as bar to proceedings for reinstatement.* Where a petitioner had a position as a driver in the fire department and upon his application for leave of absence for a year he was told that a leave could not be granted for a greater period than thirty days, but that an extension would be given at the end of that time, and he made application for an extension of his leave of absence but received no notice of the granting of the same and did not make any inquiries as to whether the extension had been actually made, and also did not concern himself in any way about the visit of an officer of the department to his residence in another State for the purpose of investigating his absence from duty, and upon whose request he claimed to have surrendered all his insignia of his position, *held*, if the petitioner did not intend to resign, he was clearly guilty of such laches in neglecting to keep himself informed as to his status such as to preclude him from the right to a writ of mandamus for reinstatement.

4. OFFICERS, § 24*—*resignation by implication.* A resignation of a public office by implication may take place by an abandonment of official duty without leave of absence or without good cause shown.

5. OFFICERS, § 24*—*sufficiency of parol resignation.* A resignation of a public office may be made by parol, no written resignation being necessary.

6. OFFICERS, § 24*—*effect of nonuser or neglect to effect vacation of position.* The intention to resign or abandon a public office may be inferred from the conduct of the officer if that conduct takes the shape of nonuser or neglect of duty so as to amount in itself to an actual vacation, the same constituting a sufficient abandonment or resignation of the office without express renunciation.

7. WORDS AND PHRASES,—*resignation of office.* The resignation of an office is the act of giving it up and is synonymous with surrender, relinquishment, abandonment or renunciation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wellman v. Wellman, 191 Ill. App. 514.

8. OFFICERS, § 24*—*sufficiency of evidence to show resignation or abandonment.* In a proceeding for a writ of mandamus for reinstatement as an officer in the fire department of the City of Chicago, evidence held sufficient to justify the judgment of the trial court in denying the writ of mandamus upon the ground that the petitioner had resigned or abandoned his position.

Frances Mary Wellman, Appellant, v. Wayne Paige Wellman, Appellee.

Gen. No. 20,315. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed February 24, 1915.

Statement of the Case.

Bill of Frances Mary Wellman against Wayne Paige Wellman for divorce and alimony on the ground of extreme and repeated cruelty. A jury, demanded by the complainant, returned a verdict finding defendant not guilty. From the verdict and decree in favor of defendant, complainant appeals.

CARL A. WALDRON and ARCHIBALD CATTELL, for appellant.

EDWARD MAHER and ARTHUR A. HOUSE, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 41*—*admissibility of specific acts of cruelty under general allegation.* In an action for divorce on the ground of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

cruelty, where the trial court by its rulings required the complainant to confine her proof and testimony strictly to the dates specifically alleged in her amended bill and refused to allow her to put any testimony under a general allegation of acts of cruelty alleged to have been committed by the defendant from September 7th to the middle of October, 1912, *held* this was material error since the rule as to proof of general allegations of acts of cruelty in a bill for divorce, while they should be alleged with reasonable certainty as to time and place, does not require the exact date and place of each particular act to be alleged, and when the conduct complained of is continued and not confined to any particular time or locality the specific allegation of time and place is impracticable and not required.

2. DIVORCE, § 41*—*admissibility of specific acts of cruelty to give color to acts charged*. In an action for divorce and alimony on the ground of cruelty, wherever there is a general allegation of divers acts of cruelty at other times than those specifically mentioned, evidence is permissible to supplement the evidence produced under the specific allegations, to give color to the acts charged and to inform the court or the jury of the general conduct of the parties and their duty towards each other.

3. DIVORCE, § 36*—*abuse of court's discretion in denying amendment to bill*. While the right to amend a verified bill for divorce does not exist as a matter of course, still where the complainant presents an amendment that appears to be germane to the original bill with an affidavit giving a reasonable excuse why such matter was not inserted in the first instance, equity will favor such an amendment even on the hearing, provided it is not inconsistent with the original pleadings and does not entitle the complainant to a different sort of relief, the court's refusal to grant such an amendment constituting an abuse of its discretion, reviewable upon appeal.

4. DIVORCE, § 36*—*where refusal to permit amendment to bill at trial constitutes reversible error*. Where the trial court refused the complainant leave to amend her amended bill for divorce on the ground of cruelty, during the trial, by setting up an act of cruelty committed on a specific date by defendant, *held* erroneous under the facts and circumstances set forth in the affidavits presented and filed in support of the motion, where it also appeared that the court permitted the defendant and his mother and father to testify to a quarrel that occurred on that day and counsel for complainant attempted to cross-examine as to occurrences on that day, but the court denied him the right because the date was not specifically set out in the amended bill, such rulings serving to emphasize and make

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wellman v. Wellman, 191 Ill. App. 514.

more grievous the court's error in refusing the complainant leave to amend her bill and to set up the act of cruelty that occurred on that date.

5. TRIAL, § 46*—*where remarks of court tending to influence verdict.* Where a statement of the court in the presence of a jury of what occurred in chambers in an effort of the court to obtain a reconciliation of the parties in a case for a divorce after the case had been on hearing before the jury during the day and the testimony of the complainant had been delivered, tended to convey to the jury that the impression that in view of the court complainant had failed to make out her case and that she ought not to litigate further but be reconciled to her husband, *held* prejudicially erroneous since the jury having been thus informed of the view the court took of the alleged act of cruelty might be led to take the view, which they evidently did take, that the actual cruelty shown by complainant's testimony was too trivial to become the basis for a divorce and the parties ought to become reconciled and live together as husband and wife, the jury ordinarily attaching much importance to the remarks and opinions of the court.

6. TRIAL, § 45*—*effect of court's expression of opinion in divorce proceeding.* In an action for divorce on the ground of cruelty it is important that no act or expression of opinion of the court should be allowed to come to their knowledge regarding the merits of the controversy on the trial before them.

7. TRIAL, § 136*—*effect of counsel's comment on matters not in evidence.* In an action for divorce and alimony where counsel in his closing argument to the jury for defendant, over objection by complainant, was permitted by the trial court to comment on the action of the complainant during the selection of the jury in excluding from the jury all jurors except one of a certain religious faith, naming it, *held* such action of the court constituted error, since that question was not before the jury for consideration.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

George Siegfried, Defendant in Error, v. George Fritze, Plaintiff in Error.

Gen. No. 19,660. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action in forcible detainer by George Siegfried against George Fritze for the possession of a six room flat. From a judgment in favor of plaintiff for possession, defendant prosecutes a writ of error.

Before the tenancy began defendant paid two dollars to plaintiff and took the following receipt:

“Chicago, October 14, 1911.

Received of G. P. Fritze Two Dollars to apply on November 1911 rent for first flat at 3423 Perry St., rental to be at the rate of \$20 per month for the year. To be put in first-class repair as agreed.

GEO. SIEGFRIED.”

Plaintiff's claim was for forty dollars for rent alleged to be due for May and June, 1913, upon a basis of twenty dollars per month. On June 4, 1913, plaintiff gave defendant a statutory five days' notice to pay the forty dollars in question or to terminate the tenancy. On June 9, 1913, defendant offered to pay twenty dollars but no more, insisting that that was all that was due. Plaintiff declined to receive anything less than forty dollars and brought action for rent and possession.

Plaintiff testified that the condition of the tenancy was that the rent of twenty dollars should be payable in advance on the first of the month; that he told the defendant so when he called to rent the flat and that for three or four months the defendant paid the rent in advance.

Burns et al. v. Myers et al., 191 Ill. App. 518.

Defendant denied that there was anything said about payment in advance and contended that the rent was not payable until the end of the month, but he himself introduced several receipts which showed that he did not wait until the end of the month before paying.

C. L. CASSIDAY, for plaintiff in error.

MARTIN C. KOEBEL, for defendant in error; E. M. SEYMOUR, of counsel.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 5*—*where lease is distinguished from receipt*. In an action of forcible detainer, an instrument purporting to be a receipt for a certain sum to apply on a subsequent month's rent for a certain flat at a certain rate per month for the year, with the condition that the premises were to be put in first-class repair as agreed, *held* to be a receipt rather than a lease containing all the conditions of the renting.

2. LANDLORD AND TENANT, § 325*—*sufficiency of evidence to show rent payable in advance*. In an action of forcible detainer evidence *held* sufficient to sustain the court's finding that the rent was payable in advance and to warrant a judgment in favor of plaintiff for possession of the premises in question.

Mark Burns and John Barnes, Appellants, v. Jennie Myers and Louis M. DeCosta, Appellees.

Gen. No. 19,817. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MAURUS A. KAVANAGH, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed March 8, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement of the Case.

Bill by Mark Burns and John Barnes against Jennie Myers and Louis M. DeCosta primarily to subject certain real estate, the title to which was in defendants, to the payment of certain claims allowed by the Probate Court of Cook county against the estate of Herman R. Myers, deceased, husband of one of the defendants and father-in-law of the other. From a decree in favor of defendants dismissing the bill for want of equity, complainants appeal.

CASWELL & HEALY, for appellants.

BITHER, GOFF & FRANCIS, for appellees.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. FRAUDULENT CONVEYANCES, § 42*—*when evidence insufficient to show insolvency of grantor.* In an action to have certain Probate Court judgments against an estate declared a lien upon real estate standing in defendant's name and for collateral relief within the general purpose of a creditor's bill, evidence held to establish that decedent was not insolvent when he conveyed the property without consideration to his wife, one of the defendants.

2. FRAUDULENT CONVEYANCES, § 58*—*where anticipatory knowledge of insolvency immaterial.* In an action to subject real estate to the lien of a judgment and for collateral relief within the general purposes of a creditor's bill, held anticipatory knowledge of the subsequent failure of a corporation in which the grantor was interested cannot be invoked to render a voluntary conveyance to his wife invalid or objectionable.

3. FRAUDULENT CONVEYANCES, § 185*—*rule as to pre-existing creditors.* Where it was sought to subject real estate standing in the wife's name to the lien of a judgment against the husband's estate, held, in the absence of evidence of insolvency, a voluntary conveyance to the wife will not be adjudged fraudulent and invalid as against pre-existing creditors who alone can complain.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Burns et al. v. Myers et al., 191 Ill. App. 518.

4. FRAUDULENT CONVEYANCES, § 49*—*effect of solvency as to conveyance of husband to wife.* In an action to subject real estate standing in the name of a wife to the lien of judgment against her deceased husband's estate and for relief within the general purpose of a creditor's bill, the question is one of the grantor's solvency at the time of the voluntary conveyance, in spite of the rule that such a conveyance under former decisions seems to have been held invalid unless the grantor is pecuniarily able to withdraw the amount of his donation from his estate without the least hazard to his creditors.

5. FRAUDULENT CONVEYANCES, § 45*—*how solvency bears on fraud.* In an action for relief as against a conveyance of real estate, while, if a fraudulent intent is shown by, or can be properly inferred from competent evidence presented, the conveyance can be set aside, and insolvency in such a case may be only one of the circumstances from which the intent may be inferred and the absence of insolvency may not be conclusive against such fraudulent intent to hinder and delay creditors, yet solvency at the time of the conveyance tends strongly to negative said intent.

6. FRAUDULENT CONVEYANCES, § 91*—*effect of husband's acting as agent for wife.* In an action to subject to a lien of a judgment against a husband's estate, real estate conveyed without consideration by him to his wife, *held* the wife's title was not affected by the fact that the husband afterwards acted for her in the collection of rents or by the fact that such income was mingled with his own money in his bank account.

7. EXECUTORS AND ADMINISTRATORS, § 467*—*insufficiency of evidence to show purchase on behalf of executrix.* Where, in an action to subject real estate to the lien of a judgment, it was contended that a sale under order of the Probate Court was only colorable, fraudulently designed to defraud creditors and void as a sale really to the executrix herself, *held* that the sale was valid in the absence of a showing of bad faith.

8. EXECUTORS AND ADMINISTRATORS, § 454*—*mere inadequacy of price insufficient for vacating judicial sale.* The fact that real estate sold under an order of the Probate Court to pay debts fails to bring its full value in the absence of bad faith is not sufficient to require that it be set aside, inadequacy of price being not infrequently associated with judicial sales, especially of property subject to mortgage and dower claims.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Maria Romani, Appellee, v. Shoal Creek Coal Company,
Appellant.****Gen. No. 19,888.**

1. PLEADING, § 459*—*effect of pleading over and going to trial after demurrer sustained to plea.* In an action by a widow for the death of her husband under the Mines and Miners' Act, a plea of the statute of limitations is waived where, after demurrer sustained, defendant, instead of standing by its plea, files the general issue and goes to trial on the second plea.

2. PLEADING, § 45*—*sufficiency of defective statement of good cause of action to save amended counts from statute of limitations.* Where a widow sought recovery for the death of her husband under the Mines and Miners' Act of 1899, as amended in 1907, secs. 18, 33, a defective statement of a good cause of action in the original counts held to have saved amended counts stating the same cause of action from a plea of the statute of limitations, on the ground that the amended counts were not filed within the statutory period of a year after the death.

3. PARTIES, § 35*—*when marriage of woman does not constitute misnomer.* Where a woman's name as plaintiff was properly given upon the institution of an action for the wrongful death of her husband, her subsequent marriage does not constitute a misnomer, as a designation of the person plaintiff.

4. MINES AND MINERALS, § 173*—*sufficiency of evidence to show statutory duty.* In an action by a widow for the death of her husband from an explosion in defendant's mine, evidence held sufficient to warrant the jury's finding that defendant owed statutory duties under the Mines and Miners' Act of 1899, as amended in 1907, secs. 18, 33.

5. MINES AND MINERALS, § 182*—*when violation of statutory duty for jury.* In an action under the Mines and Miners' Act of 1899 and 1907, secs. 18, 33, held the questions whether defendant owed a statutory duty to the deceased and whether there were violations of such a statutory duty were proper issues for the jury.

6. MINES AND MINERALS, § 173*—*where evidence supports finding of violation of statutory duty.* In an action by a widow for the death of her husband in an explosion in defendant's mine, evidence held sufficient to warrant the jury in finding that statutory duties were violated.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Romani v. Shoal Creek Coal Co., 191 Ill. App. 521.

Appeal from the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed March 8, 1915.

MASTIN & SHERLOCK and W. B. McBRIDE, for appellant.

CHARLES CHENEY HYDE and CHARLES B. ELDER, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Raphael Romani, the husband of the appellee in this case, the plaintiff below, met his death through an explosion in the mine of the appellant, the defendant below, on November 11, 1910. The plaintiff, as "his widow, dependent on him for support and damaged by his death," brought suit against the defendant Company and on March 22, 1913, on the verdict of a jury recovered judgment for fifty-five hundred dollars. The appellant asks this court to reverse this judgment on grounds hereinafter set forth.

When this accident occurred section eighteen (as amended by Act approved May 27, 1907) and a portion of section thirty-three (as amended by Act approved May 17, 1907) of the Act of April 18, 1899, concerning Mines and Miners, were respectively in force and this cause was governed by them. They read as follows:

"Sec. 18. (a) A mine examiner shall be required at all mines. His duties shall be to visit the mine before the men are permitted to enter it and first he shall see that the air current is traveling in its proper course and in proper quantity. In order to correctly determine the quantity of air in circulation in different portions of the mine it is hereby made his duty to measure with an instrument for that purpose the amount of air passing in the last cross cut or break through each pair of entries or in the last room of each division in a long wall mine and at all other points where he deems it

necessary, the same to be noted in the daily book kept for that purpose. He shall then inspect all places where men are expected to pass or to work and observe whether there are any recent falls or obstructions in rooms or roadways or accumulations of gas or other unsafe conditions. He shall specially examine the edges and accessible parts of recent falls and old gobs and air courses. As evidence of his examination of all working places he shall inscribe on the walls of each with chalk the month and the day of the month of his visit.

(b) When working places are discovered in which accumulations of gas or recent falls or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager. No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein except under the direction of the mine manager until all conditions shall have been made safe.

(c) The mine examiner shall make a daily record of the conditions of the mine, as he has found it, in a book kept for that purpose, which shall be preserved in the office for the information of the company, the inspector and all other persons interested, and this record shall be made each morning before the miners are permitted to descend into the mine."

"Sec. 33. * * * For any injury to person or property occasioned by any wilful violation of this act or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby, and in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed for a like recovery of damages for the injuries sustained by reason of such loss of life or lives not to exceed the sum of ten thousand dollars: *Provided*, that every such action

for damages in case of death shall be commenced within one year after the death of such person."

The case went to the jury on certain amended counts of the declaration (the 1st, 2nd, 4th, 5th, 6th, 8th and 9th of those filed December 5, 1912) and the general issue pleaded thereto.

One complaint of the defendant is that a demurrer to the plea of the statute of limitations to these counts was improperly sustained, that the original counts in the declaration stated no cause of action, that the amended counts were the first counts that did state a cause of action and that they were filed more than a year after the death. We do not think the defendant is in a position to raise this point. The statute of limitations was filed to these counts as a single plea, not in connection with the general issue. When a demurrer to this plea was sustained, an order on defendant to plead further to the declaration was entered, with which the defendant complied. Instead of standing by its plea of the statute of limitations it filed the general issue and on that plea went to trial. The error, if it had been an error, of sustaining the demurrer to the plea of the statute of limitations was thereby waived. *Spencer v. Aetna Indemnity Co.*, 231 Ill. 82. But we do not think there was any error in that ruling. The original counts were, in our opinion, at the worst, defective statements of a good cause of action.

Another point made by the appellant is that there was a misnomer of the plaintiff. The plaintiff's name was correctly given when the suit was brought. The evidence showed that she had afterwards intermarried with one Almerigi, but her identity remained unchanged, and was made sufficiently certain by the continued use of the name of Maria Romani.

The first of the counts on which the case went to the jury avers the duty of the defendant under the statute not to allow any of the men engaged in work in the

underground workings of said mine to remain in any part of said mine through which gas was being carried into the ventilating current nor to allow any of said men to enter said mine to work therein except under the direction of the mine manager until all conditions should have been made safe, and the wilful violation of this duty in the case of Raphael Romani by the defendant's allowing him to enter a portion of the mine in which it had allowed a dangerous condition to exist by the generation and accumulation of gas in the ventilating current, and by its allowing said Romani to remain down in said portion of the mine not under the direction of the mine manager—by reason of all which the death of Romani occurred.

The next count avers the duty of the defendant under the statute to have a mine examiner visit the mine each day before the men were permitted to enter it and to inspect all places where men were expected to pass or to work and to observe whether there were any recent falls or obstructions in rooms or roadways or accumulations of gas or recent falls or obstructions in rooms or roadways or accumulations of gas or other unsafe conditions, and to inscribe on the walls of each with chalk the month and the day of his visit, and when working places were discovered in which accumulations of gas or recent falls or any dangerous conditions existed, to place a conspicuous mark thereat as notice to all men to keep out, and at once to report his finding to the mine manager, and the wilful violation of these duties and the consequent death of Romani when "in the performance of his duty as an employee of said defendant and by its direction," he "entered into a portion of said mine in which men were expected to pass and to work."

The next count alleges the same duty of the defendant set up in the preceding count and its violation by failing to have its mine examiner visit said mine on the day of the accident before the men were permitted

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to enter it, and the consequent death of Romani, who "was permitted by said defendant to descend into its said mine for the purpose of removing his tools therefrom with the knowledge and consent of said defendant," and avers Romani, "although not then in said defendant's employ, entered into a portion of said mine where men were expected to pass or work and where there were accumulations of gas and other unsafe conditions which could and would have been observed had said inspector visited said mine" before Romani was permitted to descend into it, etc.

The next count alleges the same statutory duties and their violation by the defendant by wilfully failing "to place a conspicuous mark in a certain working place in said mine" where accumulations of gas and other unsafe conditions had been discovered; by reason whereof Romani, "who, as a miner then and there in the employ of said defendant had entered into said mine of said defendant with the full knowledge and consent of said defendant and for the purpose of removing his tools therefrom," was killed by an explosion of gas.

A further count alleged substantially the same matter as that just recited, but describes Romani as "permitted by said defendant to descend into its said mine" with its knowledge and consent, "although not then in said defendant's employ, for the purpose of removing his tools therefrom."

Still another count alleged that Romani had been employed by the defendant up to within a short time before the day of his death, when, by reason of dangerous conditions existing in the passageway or gallery leading to his working place, he was instructed by said defendant to stop work in the portion of said mine where he was then working. After averring, like the other counts, the statutory duties of the defendant to have a mine examiner visit the mine each day before the men were permitted to enter it and in case of discovering dangerous conditions in any place to place a

mark thereat, and the violation of said duties, the count asserts that Romani, who had been a miner in the employ of the defendant to within two weeks before, and "who in anticipation of performing other work in said mine in the employ of defendant had left his tools in a certain portion of said mine of said defendant with the full knowledge and consent of said defendant, was permitted by said defendant to descend into its said mine, and with the knowledge and consent of the defendant entered by way of a passageway and gallery other than that which was in a dangerous condition into said portion of said mine where he had left his tools," which had been his working place, for the purpose of removing his tools, and that there was an accumulation of gas there, but no conspicuous mark, and that thereupon there was an explosion which caused Romani's death.

The last count specifically avers the violation of its statutory duties by the defendant to have been "wilfully failing on the day aforesaid to have its mine examiner inspect a certain portion of said mine where men were expected to pass or to work" and "wilfully failing to observe that there were accumulations of gas or other unsafe conditions in said portion of said mine," and alleges that the fatal explosion occurred when Romani, with the knowledge and consent of the defendant, had been permitted by said defendant to descend into a portion of the mine to remove his tools which he had left there, "which portion of said mine was a place where men were expected to pass and to work, but which had not been inspected by the said defendant on the day aforesaid, and wherein the defendant had failed to observe accumulations of gas or other unsafe conditions then and there existing."

The attack on the judgment most insisted on is based on the position that the case should have been taken from the jury by a peremptory instruction for the defendant. This position is in turn based on the as-

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sumption that it was disclosed by the evidence that Romani was killed at a place where he had no right to be. The defendant's counsel say in their argument:

" * * * the deceased was killed in a part of plaintiff in error's mine which had been closed to him, which was not his working place at that time.

This question goes to the very essence of the case and is decisive of every question involved in the case. There is no principle of law or consideration of justice or public policy which would require an employer to compensate for the death of an employee which was caused by his entering a place where his duties did not call him."

The contention of the defendant is that the evidence showed Romani to be "a legal trespasser or intruder" on the defendant's property at the time of the explosion, to whom the defendant "owed no duty except not to wilfully or wantonly injure him."

It is undoubtedly true that if Romani was a trespasser, going without right where he had no warrant for going when the explosion occurred, this judgment is wrong. But we cannot assume this, and we think there was evidence from which the jury were at liberty to find the contrary. There was a conflict of testimony at the trial on several points of importance, but there was certainly evidence that, as the plaintiff's counsel puts it:

"He (Romani) was employed by the defendant as a miner and had been given a working place. He was paid in accordance with the amount of coal he mined. He had a regular pay day on the 15th and 30th of each month. His pay day had not arrived on the 11th and he was still carried on the books of the Company. To get his pay he had to go to the mine manager at the bottom of the mine. He had left his tools in the mine at his working place in accordance with the custom. He would not be paid off until he went to the office at the top of the mine. He had a right to go to get his tools."

And although there was contradiction of the further statement that follows in counsel's argument—

"The mine manager authorized him to go there and there was no danger sign to prevent his going there"—there was ample evidence to go to the jury to sustain that assertion, and the jury were from it at liberty to find and evidently did find that this was the fact. Under the conditions that the jury were warranted in finding existed, it seems to us that there can be no doubt that towards Romani the defendant at and immediately before the time of the accident owed statutory duties. *Brunnworth v. Kerens-Donnewald Coal Co.*, 260 Ill. 202, p. 218; *Riley v. W. Holland & Sons, Ltd.*, Law Reports, 1 King's Bench Div. (Court of Appeal) p. 1029 (1911); *Molloy v. South Wales Anthracite Colliery Co.*, 4 Butterworth's Workmen's Compensation Cases, p. 65 (1910).

It further seems to us that there was evidence warranting the jury in finding that those duties were violated. The rulings on the instructions were, to speak generally, in accordance with this theory. The court left to the jury the questions whether the conditions we have described existed, and whether the violations of duty alleged occurred. We do not think a more detailed discussion of them or of the evidence would serve any good purpose. We find no substantial error in the record, and the judgment of the Superior Court is affirmed.

Affirmed.

Procter & Gamble Co. v. Emerman, 191 Ill. App. 530.

**Procter & Gamble Company, Defendant in Error, v.
H. Emerman, trading as American Iron & Supply
Company, Plaintiff in Error.**

Gen. No. 20,073.

1. **INTEREST, § 8***—*what constitutes instrument in writing within statute.* Where recovery was sought for breach of contract to supply cast borings *held* that a letter of offer, neither before nor after acceptance, was such an instrument in writing as to come within the sense of such words used in the interest statute.

2. **SALES, § 382***—*where buyer may charge resulting loss on purchase elsewhere.* In an action by a buyer for breach of contract for failure to deliver cast borings, where the buyer made request for quotations for a like quantity and they were bought at the lowest price that they could be bought and they cost the buyer a certain sum more than the purchase price, *held* under the circumstances, in the absence of a standard market price, the proper measure of damages was used in awarding an actual compensation and no more for the loss sustained by reason of the seller's repudiation of the contract, since the buyer took the usual best and probably only way of supplying the default made by the seller by buying at the best price possible.

3. **INTEREST, § 6***—*when not allowed in action on breach of contract of purchase.* In an action for breach of contract to supply cast borings where the damages were unliquidated and determinable only upon proper proof as to the amount thereof, *held* that interest could not be properly allowed, as on money withheld for unreasonable and vexatious delay.

Error to the Municipal Court of Chicago; the Hon. HARRY OLSON, Judge, presiding. Heard in this court at the March term, 1914. Affirmed on remittitur, otherwise reversed and remanded. Opinion filed March 8, 1915.

H. C. LEVINSON, for plaintiff in error; LEO W. HOFFMAN, of counsel.

HOLT, CUTTING & SIDLEY, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

February 15, 1912, the Procter & Gamble Company, having a manufacturing plant at Ivorydale not far from Cincinnati, Ohio, wrote to the "American Iron & Supply Company," a name under which one Herman Emerman of Chicago was doing business, asking for a quotation of prices on 500 tons of clean cast borings "delivered Ivorydale, Ohio, in equal quantities, delivered during February and March." In answer the Procter & Gamble Company received by mail two days afterwards the following letter:

"AMERICAN IRON & SUPPLY Co.,
Chicago 2-16-12.

PROCTER & GAMBLE COMPANY,
Ivorydale, Ohio.

Gentlemen: In answer to your letter of the 15th beg to advise we would be glad to sell you 500 tons Good Clean Cast Iron Borings at \$7.00 net ton. Delivered your works Ivorydale. For shipment to be made as you mention during the months of February and March. If this price is satisfactory to you, kindly favor us with your order by return mail and oblige,

Yours very truly,
AMERICAN IRON & SUPPLY Co.,
per H. Emerman."

On the 19th of February the Procter & Gamble Company inclosed the following order to the "American Iron & Supply Co.":

"This is our Order No. 4926.
IVORYDALE PURCHASING DEPARTMENT.
Ivorydale, Ohio, Feb. 19, 1912.

To AMERICAN IRON & SUPPLY Co.,
Chicago, Ills.

Enter for prompt attention our order as below:
500 tons good clean cast iron borings—price \$7.00 per net ton delivered Ivorydale. Should it be necessary to communicate with us regarding this order,

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refer to the above number and show our order number on your invoice without fail.

Shipping Directions:

Ship Deliveries during February and March. Via — Route

THE PROCTER & GAMBLE COMPANY,
by A. Fowler."

Accompanying the order was a letter from the Procter & Gamble Company to the American Iron & Supply Company acknowledging the receipt of the letter of the 16th from the Supply Company, noting that an order for 500 tons of borings was inclosed, and concluding:

"Please see that deliveries are made promptly as we will depend on you for our requirements. After these deliveries are completed we will contract for a further supply. Borings to be shipped in box cars."

The borings were not shipped. The order was returned by "The American Iron & Supply Co." in a letter signed "The American Iron & Supply Co. per H. Emerman," dated February 24, 1912, in which it was said that "a stenographical error" had been made in the letter of the Supply Company of February 16th, "as the price of borings should have been \$7.00 net ton F. O. B. cars Chicago, instead of Ivorydale. The rate is \$1.80 per ton from Chicago to Ivorydale."

The Procter & Gamble Company declined to accept or accede to this repudiation of the contract which they maintained had been made, and a correspondence ensued in which the Procter & Gamble Company demanded a performance of the alleged contract and "The American Iron & Supply Company" refused it. In a letter of February 27th, Emerman, under the name of the American Iron & Supply Company, insisted again that a "stenographical error" had been made. He said:

"The letter was dictated by the writer but not re-read and it was signed by the stenographer. Our stenographer finds in looking over her notes that she has \$7.00 F. O. B. Chicago, but that in transcribing same

she made an error and wrote *F. O. B. Ivorydale* instead of *F. O. B. Chicago*, and she is ready to testify to that effect."

March 1st Emerman wrote:

"We are herewith again returning your order, as we have already advised you the reason in our letters of February 24th and 27th. This is final."

Writing apparently to lawyers for the Procter & Gamble Company, who had intervened in the matter, Emerman, writing as before under the name of the "American Iron & Supply Co." said:

"We received your letter of the 6th and contents noted. In reply wish to advise that the only thing we can say is that there has been a stenographical error made as to the price. The price on the borings was to be \$7.00 net per ton Chicago, instead of delivered. Our stenographer made a mistake in transcribing her notes."

No other reason than the alleged "stenographical error" was given by Emerman or "The American Iron & Supply Company" in any of this correspondence for the nondelivery of the borings according to the tenor of the claimed contract. Nothing was said of any want of authority in the stenographer of Emerman to sign the letter of February 16th nor of the letter of Procter & Gamble Company of February 19th, covering the order, injecting any new condition into the order or proposed purchase. After the cessation of the correspondence the Procter & Gamble Company sent out inquiries by mail to various parties dealing in "clean cast iron borings," asking for quotations on 500 tons. Mr. Fowler, for the Procter & Gamble Company, testified that he bought such borings at the lowest price he could get them at; that the price kept advancing, and that when he had obtained at the lowest price at which he could buy substantially 500 tons—that is, 500 tons lacking a few pounds—they had cost the Procter & Gamble Company \$662.04 more than it would have been obliged to pay Emerman for them

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under the terms of the contract which it claimed he had made with it.

September 30, 1912, the Procter & Gamble Company brought suit against Emerman in the Municipal Court of Chicago for the damages thus sustained by it by the breach of the alleged contract of sale, and on a trial before the court without a jury obtained judgment October 20, 1913, for \$704.48, being the amount before named of \$662.04, with interest on it at the rate of 5 per cent. per annum from July 1, 1911, to October 20, 1913, the first named date being arbitrarily selected as one later than all payments made by the Procter & Gamble Company on account of the borings bought in substitution for those contracted for with Emerman.

A writ of error has been sued out of this court to reverse this judgment. We see no sufficient reason to disturb it except in the matter of interest allowed. It is argued that the correspondence between the plaintiff and the defendant did not constitute a contract because the acceptance of the defendant's offer was not in the exact terms of the offer, but contained a material additional element, namely, that the borings should be shipped in box cars. The so-called "condition" was not in the order, but might well be considered as a mere request by the purchaser. Although Mr. Fowler in answer to questions on cross-examination said he wanted the borings shipped in box cars and wouldn't have accepted them any other way, it remains the fact that he was not given the chance either to take or reject them on account of the way they were shipped. Whether a liability for a breach of contract would have attached to the Procter & Gamble Company had it refused the borings because not shipped in box cars, is the test of whether a contract existed, irrespective of this request or "condition" concerning box cars.

But the question is academic and immaterial in this case. No objection to the performance of the con-

tract was made before this suit was brought because of this suggestion of "box cars." The sole reason assigned for the refusal was the alleged error made by the stenographer in transcribing her notes.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." *Railway Co. v. McCarthy*, 96 U. S. 258; *Schuyler County v. Missouri Bridge & Iron Co.*, 256 Ill. 348.

The same reasoning holds good as to the alleged want of authority on the part of Emerman's stenographer to sign the letter of February 16, 1912, after dictation to her.

As the Court very properly said in refusing to hold the so-called "Proposition of law" which set forth that the said letter "was never signed by the defendant and that the signature thereto was never authorized by the defendant," this is a question of fact, not of law. The defendant is not at liberty under the circumstances now to raise it; but if he were, there was quite enough evidence in the record to warrant the trial judge in holding that the stenographer had the requisite authority, despite the somewhat unconvincing testimony of the defendant on the witness stand:

Whether or not the alleged mistake in "transcription" was so "proven" as to prevent the trial judge from justifiably holding that there was no mistake, is much more than doubtful. The statements made by Emerman in letters to the plaintiff after the order had been sent are not evidence of the fact; nor is the properly excluded "certificate" of Muriel Goldstine, which the defendant tried to introduce. We fail to find that Emerman testified in this case that he did not dictate to his stenographer the words which occur in the letter sent—"Delivered your works, Ivorydale." It may be noted that the excluded statement of the

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stenographer says she made a mistake and wrote "\$7.00 F. O. B. Ivorydale"—a manifestly incorrect assertion.

But not only did Emerman himself neglect at least to swear that he dictated anything different from that which was transcribed, he did not call on the stand the stenographer who he maintains made the mistake. She was present in the court room. It was for him to prove the mistake if he deemed it material, and the quotation in his own brief from Wigmore on Evidence applies to the situation:

"The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant, permits the inference that its tenor is unfavorable to the party's cause."

Emerman's best excuse, however, for not attempting to produce this testimony is inconsistent with his main contention. It was not material. Even if the mistake in the quotation of price existed, it did not prevent the formation of a contract. It could not do so unless the price quoted was so low as to make the mistake obvious. *Steinmeyer v. Schroepfel*, 226 Ill. 9; *Singer v. Grand Rapids Match Co.*, 117 Ga. 86; *Crilly v. Board of Education*, 54 Ill. App. 371.

"Where there has been no misrepresentation and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law, the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous." Baggallay, Lord Justice, in *Tamplin v. James*, Law Reports, 15 Chancery Div. (1880) 215.

In this case, although it is maintained by the plaintiff in error that the alleged mistake was obvious because the price quoted was so low, the contention seems almost frivolous in view of the existence in the same argument, when the question of damages is considered, of the assertion that the price quoted was above the

current prices. We are of the opinion that the "mistake," if there were a mistake, was not obvious.

The complaint made that the trial judge committed error and vitiated the findings by adding explanations to his holdings on propositions of law is without merit. We see nothing improper in his action or wrong in his holdings.

The measure of damages is the only matter which can be considered as suggesting a question of doubt in this case. On full consideration, however, we deem that the testimony of Mr. Fowler for the plaintiff shows that a correct theory was adopted and that justice has been done by awarding an actual compensation and no more for the loss sustained by the defendant in error through the breach of the contract.

We think it sufficiently appears that it took the usual, best and, probably, the only way of supplying the default made by the plaintiff in error—that it bought the goods at the best price possible; that there was at the time no standard "market price" to be consulted and from which damages could be now computed. We therefore hold that \$662.04 was the proper amount of damages for the court to assess. But we cannot see justification for adding interest to this. We are unable to accede to the position that the letter of offer, before or after acceptance, was "an instrument in writing" in the sense in which those words are used in our interest statute. And as the damages were unliquidated and could only be determined when proof was made that the correct method of determining their amount had been used, we cannot see how it is properly allowed, as on money withheld by "an unreasonable and vexatious delay of payment."

If the defendant in error remits within ten days from the amount of the judgment the sum of \$42.44, the said judgment will be affirmed; otherwise it will be reversed and the cause remanded.

Affirmed on remittitur; otherwise reversed and remanded.

Richter v. Chicago & Erie R. Co., 191 Ill. App. 538.

Charles B. Richter, Appellee, v. Chicago & Erie Railroad Company, Appellant.

Gen. No. 19,284.

1. **APPEAL AND ERROR, § 839***—*when extension of time following Lincoln's birthday inoperative.* Where plaintiff secured a verdict and judgment, and the court gave defendant sixty days from December 14, 1912, to file a bill of exception, the time for the filing of the bill under the order ordinarily expiring on February 11, 1913, an order of court on February 13, 1913, extending the time for filing of the bill comes too late and the Appellate Court will strike from the record a bill of exceptions filed within the attempted second extension since Lincoln's birthday, February 12th, is not a holiday with reference to the performance of judicial functions or clerical duties by the officers of the court such as to excuse the failure to file the bill of exceptions within the time allowed by the court expiring on that day.

2. **HOLIDAYS, § 1***—*how Lincoln's birthday not dies non juridicus.* On a motion to strike a bill of exceptions filed after the expiration of the time given within which to file such bill of exceptions, the fact that the time given expired on Lincoln's birthday, *held* not to excuse the filing of the same, since Lincoln's birthday is not a holiday with reference to the performance of judicial functions or clerical duties by officers of the court.

3. **APPEAL AND ERROR, § 1595***—*when declaration aided by verdict.* Upon a motion in arrest of judgment upon a verdict in favor of plaintiff, if the declaration contains terms sufficiently general to include by fair and reasonable intendment any matters necessary to be proved and without which the jury could not have given the verdict, the want of an express averment is cured by the verdict.

4. **MASTER AND SERVANT, § 555***—*when verdict negatives assumption of risk.* In an action by a brakeman for the loss of a foot while uncoupling cars in a moving train, upon a motion in arrest of judgment upon a verdict, *held* that the declaration must be construed to state a cause of action and to negative the assumption of risk by the plaintiff, after verdict all intendments and presumptions being in favor of the pleader.

Appeal from the Circuit Court of Cook county; the Hon. JOHN A. DOWDALL, Judge presiding. Heard in this court at the March term, 1913. Affirmed. Opinion filed March 8, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

W. O. JOHNSON and BULL & JOHNSON, for appellant.

I. T. GREENACRE, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Plaintiff Richter, a brakeman in the service of the defendant, the Chicago & Erie Railroad Company, brought this action to recover for the loss of his foot while uncoupling cars in a moving train. There was a verdict and judgment for the plaintiff for nineteen hundred and fifty dollars damages, from which the defendant appealed. The court gave the defendant sixty days from December 14, 1912, to file a bill of exceptions. The time for filing the bill under this order would ordinarily expire February 11th, and no bill of exceptions was signed or filed on or before that date. February 13th, over the objection of plaintiff, an order was made extending the time for filing the bill to March 1st, and February 28th the bill was filed. In *Trustees of Schools v. Griffith*, 263 Ill. 550, it was said (p. 552) that the bill of exceptions was not filed until after the time fixed by the order of the court had expired, and the motion of the defendant to strike the bill from the files was sustained and the holding of the court announced in open court at the February term. The files and record of the Supreme Court show the motion of appellees and that appellants filed in opposition thereto points in which it was admitted that under the order the time for filing the bill of exceptions would ordinarily have expired August 31st, and that the bill was not filed until September 2nd; but it was contended that as September 1st was Labor Day and a legal holiday, that therefore the time for filing the bill was by operation of law extended to September 2nd. The oral announcement of Mr. Justice Cartwright was as follows:

“There is also a motion by appellee to strike the bill of exceptions because not filed within the time allowed

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by the Court. It was not filed within the time and the reason or excuse offered is that the time expired on the 2nd of September, on Monday, which was Labor day and consequently a holiday. Labor day is a holiday for certain purposes specified. It is not a holiday with reference to the performance of judicial functions or clerical duties by officers of the Court and is no excuse for not filing the bill of exceptions in the time allowed by the Court. The motion is allowed and the bill stricken from the files."

In the present case February 12th was Lincoln's birthday, and under the rule announced in the case cited it was not a holiday, and it was no excuse for not filing the bill of exceptions in the time allowed by the court that February 12th was Lincoln's birthday. For the reason stated the bill is stricken from the files.

The striking of the bill of exceptions from the files leaves only the question whether the court erred in overruling defendant's motion in arrest. After verdict all intendments and presumptions are in favor of the pleader, and if a declaration contains terms sufficiently general to include, by fair and reasonable intendment, any matters necessary to be proved and without which the jury could not have given the verdict, the want of an express averment of such matter is cured by verdict. *Sargent Co. v. Baublis*, 215 Ill. 428.

We think that after verdict the declaration must be held to state a cause of action and to negative the assumption of risk by the plaintiff, and that the court did not err in overruling defendant's motion in arrest.

The motion to strike the bill of exceptions from the record is sustained, and the judgment of the Circuit Court is affirmed.

Affirmed.

**H. N. Lund, Plaintiff in Error, v. A. H. Zimmermann,
Individually and as Trustee, Defendant in Error.****Gen. No. 19,666. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. THOMAS F. SCULLY, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

Statement of the Case.

Action by H. N. Lund against A. H. Zimmermann as an individual and as trustee, upon a written transfer and assignment of all interest in certain property From a judgment of *nil capiat* in favor of defendant, plaintiff brings error.

On March 1, 1913 the Hildebrandt Fuel Company, being in financial trouble, executed a written assignment and transfer to defendant of all its assets consisting of accounts receivable, horses and wagons, tools and machinery, wood and lumber in a yard, other personal property and an interest in a certain lease, subject to the approval of its creditors. More than seventy-five per cent. in the amount of the creditors of the Company consented to such assignment. On March 15, 1913, upon plaintiff's paying defendant eight hundred dollars, Zimmermann executed the following instrument:

"Chicago, Mar. 15, 1913. In consideration of the sum of Eight Hundred Dollars (\$800) in cash to me in hand paid, I hereby sell, transfer and assign all interest I now have or may have as Trustee or otherwise given to me under an assignment made by one H. Hildebrandt, Jr., on behalf of the H. Hildebrandt Fuel Company, and dated March 1st, 1913, and approved by the creditors of the said H. Hildebrandt Fuel Company; to all the property of the said Company, to one H. N. Lund. It is, however, understood that I do not in

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any way represent or warrant that I have perfect title to said property, or that I can deliver perfect title or possession of same, except as is shown in the above named instruments, and the purchaser, H. N. Lund, hereby assumes all risks of loss and damage of any kind, nature or description. And it is further agreed that the only effect of this assignment is to transfer whatever title I now have or may have without question of legality or without any warranty on my part whatsoever. Witness my hand and seal this 15th day of March, A. D. 1913."

A few days later the Hildebrandt Fuel Company filed a voluntary petition in bankruptcy. The action in question was instituted on April 4, 1913. It did not clearly appear whether Zimmermann took formal possession of the property assigned him. He and Lund went to the yard and examined and checked over the property.

FREDERICK SASS and DANIEL A. ROBERTS, for plaintiff in error.

BOYLE, MOTT & HAIGHT, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. CHAMPERTY AND MAINTENANCE, § 5*—*when property not in adverse possession of another.* Where a corporation executed an assignment to a trustee with the consent of a majority of its creditors and the trustee made a written assignment of the property in question to plaintiff, after which the corporation filed a voluntary petition in bankruptcy in an action upon the trustee's transfer or assignment, *held* the facts did not bring the case within the rule that a sale of personal property in the adverse possession of another is void.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 97*—*where instrument inoperative as warranty.* In an action to recover upon a written transfer and assignment by a trustee of a corporation made

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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shortly before the filing of a voluntary petition of bankruptcy, *held* that the instrument sued on constituted neither a warranty nor a fraudulent misrepresentation, its effect being only to transfer whatever title the grantor had, the grantee expressly assuming all risks or loss.

**The A. H. Andrews Company, Defendant in Error, v.
C. P. Lautenschlager, Plaintiff in Error.**

Gen. No. 20,008. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by The A. H. Andrews Company, a corporation, against C. P. Lautenschlager to recover damages for breach of a written contract of purchase of seating for a theater. From a judgment in favor of plaintiff for \$349.62, defendant brings error.

By written agreement defendant purchased and ordered from plaintiff seating for a theater to the number of 650 (more or less, according to plan) at \$1.70 "per setting" according to the specifications attached to the contract and made a part thereof. By the original contract defendant also agreed to buy back approximately sixteen chairs at \$1 per chair. Two days after the instrument was signed Lautenschlager went to plaintiff's office for the purpose, as he testified, of canceling the contract. With him was the representative of a rival seating concern, but that fact was not disclosed to plaintiff. Lautenschlager complained to Merle, secretary and general manager of the corporation, that the prices named in the instrument were too

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high. Merle consented to a reduction of the price of the chairs from \$1.70 to \$1.61½ "per setting" and to an increase of the price of the sixteen chairs which plaintiff was to take back from defendant from \$1 to \$1.35 per chair, and Merle drew his pen through the original figures and wrote in the figures above named. Lautenschlager then, on the suggestion of the man who came with him that the contract had been changed and was void, refused to "O. K." the changes so made in the instrument, and left plaintiff's office, saying that he would have to see his father before indicating by his initials his consent to the changes, and now contends that by such alteration in the instrument that the same was altered and either made void or as modified became the contract of the parties, and that the recovery must be made on the contract as so altered and modified.

Defendant failed to furnish a seating plan and the plan furnished by the plaintiff provided for 648 seats, upon which recovery was based.

GEORGE H. MASON, for plaintiff in error.

GREGORY & McNAB, for defendant in error; ALBERT S. LONG, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 430*—*what constitutes acceptance of contract.* In an action for breach of contract of purchase of seating for a theater, *held* that the jury might properly find that the contract was accepted by the plaintiff corporation since immediately after the instrument was signed by plaintiff's salesman and defendant it was exhibited to the secretary and general manager of the plaintiff, when his oral approval was given.

2. CORPORATIONS, § 430*—*effect of officer's oral approval of contract.* In an action for breach of a written contract for seating

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The A. H. Andrews Co. v. Lautenschlager, 191 Ill. App. 543.

in a theater, where the instrument provided that the passing on and acceptance of the contract by an officer of the corporation should be an approval of it by the corporation, such approval of the contract may be shown by the officer's oral acceptance of same.

3. SALES, § 62*—*when contract may state approximation.* In an action for breach of contract where defendant was to furnish a seating plan for chairs purchased for a theater, on his failure to do so within the time given he cannot complain that the contract is void for uncertainty because it provided for the furnishing of an approximate number of chairs, the exact number of which could not be ascertained until the seating plan was furnished, especially where recovery was based on a less number than the approximation.

4. ALTERATION OF INSTRUMENTS, § 14*—*where inoperative to effect original obligation.* Where recovery was sought for breach of a contract of purchase of seating for a theater, evidence held insufficient to show mutilation of the instrument since the proposed alterations were innocent, failing to become effective because of the defendant's refusal to ratify the contract as altered, so that plaintiff could recover on the original obligation.

5. SALES, § 331*—*where amount of recovery not excessive.* Where defendant in an action for breach of contract of purchase of seating for a theater contended that the damages were excessive, because if a plan of circular seating were adopted a less number of seats could have been placed in the theater than the number on which the recovery was based, held that the damages were properly estimated on the number furnished under the plan provided by the plaintiff, as the jury might take that number as the basis for estimating plaintiff's damages, the contract not providing for a circular plan of seating.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lips et al. v. Cermak et al., 191 Ill. App. 546.

**Alexander Lips and Benjamin F. Nysewander, Jr., by
J. L. Nysewander, Plaintiffs in Error, v. Anton J.
Cermak and Anna L. McCoid, Defendants in Error.**

Gen. No. 20,236. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed March 8, 1915.

Statement of the Case.

Proceeding for trial of right of property in an automobile by Alexander Lips and Benjamin F. Nysewander, Jr., the latter suing by J. L. Nysewander, his next friend, against Anton J. Cermak and Anna L. McCoid. From a judgment in favor of defendants, plaintiffs bring error.

The machine was taken by defendant Cermak as bailiff, under an execution on a judgment in favor of defendant, Anna L. McCoid, against Benjamin Nysewander, Sr. The evidence tended to show that Nysewander, Sr., the judgment debtor, had no interest in the machine. Benjamin Nysewander, Jr., had traded real estate belonging to plaintiff Lips for the machine and was still in possession when it was levied upon under the execution.

The only evidence offered for the defendants was the files in a suit in replevin in the Municipal Court to recover possession of the automobile, in which Lips was plaintiff and Cermak and McCoid defendants and the following entry:

“July 2/13. Rooney. Tr. by Ct. Fndg. right prop. in repn. not in plff. Judg. for Defts in repn. reto hab & C. Bd. \$1500.”

HARRY H. FELGAB, for plaintiffs in error.

Romman v. Marx, 191 Ill. App. 547.

PARKER & KING and JOHN STELK, for defendants in error; OTTO C. RENTNER, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 19*—*ineffectiveness of abbreviated judgment.* In a proceeding for trial of right of property taken under an execution, an abbreviated record of a judgment in the Municipal Court in replevin between the same defendants and one of the plaintiffs, *held* not to constitute any evidence of a judgment in the replevin action.

2. JUDGMENT, § 539*—*where adjudication in replevin not conclusive of trial of right of property.* In a proceeding for trial of right of property, a judgment in a prior replevin suit between the same defendants and one of the two plaintiffs in the second action, *held* not to constitute a bar to the proceeding between the same defendants and the plaintiff for trial of right of the same property taken under an execution.

Harry Romman, Defendant in Error, v. Walter Z. Marx, Plaintiff in Error.

Gen. No. 20,253. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by Harry Romman against Walter Z. Marx to recover damages for assault and battery. From a judgment on a verdict for three hundred dollars in favor of plaintiff, defendant brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Teich v. Midland Machine Co., 191 Ill. App. 548.

LEO KORETZ and ELMER, COHEN & BELASCO, for plaintiff in error.

ARNOLD HEAP, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. ASSAULT AND BATTERY, § 22*—*when damages not excessive*. In a civil action for assault and battery, a verdict for three hundred dollars is *held* not to be excessive.

2. ASSAULT AND BATTERY, § 13*—*admissibility of weapon in evidence*. In an action for damages for assault and battery, the admission in evidence of a file, which was not found until two days after the assault and which was not shown to have been used by the defendant, *held* not to have been prejudicially erroneous, since the jury might have properly found from the evidence, that the defendant inflicted the injuries by striking the plaintiff upon the head with some instrument.

Curt Teich, Defendant in Error, v. Midland Machine Company et al., Plaintiffs in Error.

Gen. No. 20, 378.

1. APPEAL AND ERROR, § 1833*—*when bill may be amended on general remand*. Where a decree in a general creditor's bill combined with a bill under the Corporation Act, sec. 25 (J. & A. ¶ 2442) was reversed and the cause remanded generally without any specific direction to the court, *held* that the court had authority to permit an amendment to the bill and to hear the cause *de novo*.

2. CREDITORS' SUIT, § 61*—*when allegations sufficient to sustain decree pro confesso*. The allegations of a general creditor's bill combined with a bill under the Corporation Act, sec. 25 (J. & A. ¶ 2442), *held* sufficient to sustain a decree taken *pro confesso* upon an election to stand by a demurrer overruled.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Teich v. Midland Machine Co., 191 Ill. App. 548.

Error to the Circuit Court of Cook county; the Hon. ADELOR J. PETT, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

FELSENTHAL, BECKWITH, WILSON & SPENGLER, for plaintiffs in error; DAVID LEVINSON, of counsel.

A. G. DIOUS, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court. This was a general creditor's bill combined with a bill under section 25 of the Corporation Act (J. & A. ¶ 2442). The decree granted full relief on each theory of the bill and the defendants sued out a writ of error. The defendants, other than Jones and Linick, did not assign errors, were summoned and severed, and the two defendants above named prosecute the writ. The case was before Branch "D" of this court and the decree was reversed and the cause remanded. *Teich v. Midland Mach. Co.*, 177 Ill. App. 354. After the cause was reinstated in the Circuit Court the complainant amended his bill, the defendants demurred to the bill as amended, their demurrer was overruled, they elected to stand by their demurrer and the bill was taken as confessed. The court heard proofs offered by complainant in support of the bill.

When the decree was reversed and the cause remanded generally without any specific direction to the lower court, that court had authority to permit a change in the pleadings and to hear the cause *de novo*. *Dinsmoor v. Rowse*, 211 Ill. 317; *Lang v. Metzger*, 206 Ill. 475, citing *Chickering v. Failes*, 29 Ill. 294; *Parker v. Shannon*, 121 Ill. 452; *Perry v. Burton*, 126 Ill. 599; *Cable v. Ellis*, 120 Ill. 136; *West v. Douglas*, 145 Ill. 164; *Rush v. Rush*, 170 Ill. 623.

The original bill alleged the recovery of a judgment by complainant against the Midland Company in 1909 for \$1,559.25; that the same was unsatisfied; that execution had been issued and returned *nulla bona*;

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that plaintiffs in error each owned \$24,900 of the capital stock of said corporation and that they owed the corporation at least fifty one-hundredths of the amount of their stock. The amendment to the bill alleged that said corporation in November, 1909, sold most of its assets to another corporation for \$35,000, of which \$25,000 was used to pay the debts of the corporation and \$10,000 divided between Jones and Linick, and that as a result thereof the Midland Company became insolvent; that Jones and Linick received \$600 rent on a lease owned by the Midland Company and appropriated the same to their own use; that they were at the time directors of the Midland Company and became trustees of said money for the benefit of creditors and particularly trustees for complainant for enough of such money to pay his judgment. The court by the decree found the facts as alleged in the bill as amended, declared that Jones and Linick were trustees of said \$10,000 and \$600, the money of the Midland Company, for the benefit of complainant, the sole remaining creditor of said Company, that the amount due on said judgment, including interest and costs, was \$1,935.94, and decreed that Jones and Linick pay to complainant that sum with interest and costs.

It is to reverse this decree that this writ of error is prosecuted. The bill was taken *pro confesso*, and although evidence was admitted its sufficiency to sustain the decree cannot be questioned. The decree might have been rendered without any evidence, and therefore the only inquiry admissible is as to the sufficiency of the allegations of the bill. *Hannas v. Hannas*, 110 Ill. 53; *Hopkins Amusement Co. v. Frohman*, 202 Ill. 543.

The allegations of the bill as amended are sufficient to support the decree and it is affirmed.

Affirmed.

William B. Walrath, Plaintiff in Error, v. Claude E. Andersen, Defendant in Error.**Gen. No. 20,427.**

1. GUARANTY, § 17*—*when lack of notice fails to affect obligation if liability is primary.* In an action on a written guaranty by the assignee of a contract for the sale of real estate on instalments, *held* by the terms of the guaranty the liability was primary so that the assignee was not required to notify the defendant of the principal's default since it was the duty of the guarantor to see that payments guarantied by him were made.

2. GUARANTY, § 27*—*necessity of showing damages through lack of notice of principal's default.* In an action upon a guaranty that certain payments would be made on real estate sold upon instalments, *held*, even if the guaranty be considered collateral rather than absolute, unless the guarantor suffered loss or injury by want of notice of default in such payments, he is liable on his guaranty.

3. GUARANTY, § 1*—*evidence sufficient to support recovery on.* In an action on a written guaranty running to the purchaser of an owner's interest in real estate sold on instalments, evidence *held* to show a right of recovery of the amount claimed upon the guaranty that instalments would be paid to include a certain minimum sum.

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment here. Opinion filed March 8, 1915.

STEWART JOHNSON, for plaintiff in error.

CASWELL & HEALY, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court. Defendant, Andersen, owned eight houses and lots and contracted to sell them to different persons. The terms as to each lot were a certain amount in cash, balance by the assumption of a mortgage and the excess of the purchase price over the mortgage to be paid in monthly instalments. September 23, 1911, An-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Walrath v. Andersen, 191 Ill. App. 551.

dersen assigned the contracts and conveyed the lots to plaintiff, Walrath. The instrument by which the contracts were so assigned contains the following provision:

"If any of the contract purchasers default, neglect or refuse to make the payments in accordance with the terms of each respective contract, party of the second part hereby agrees that he will make all of such payments himself out of his own pocket until \$400 has been paid on the principal of each respective contract."

In an action by Walrath against Andersen on this guaranty there was a judgment of *nil capiat*, to reverse which this writ of error is prosecuted.

The amount claimed by the plaintiff was \$449.31 on three of the contracts of sale so made by Andersen, to-wit, 7407 S. May street, 5615 Hoyne avenue and 1528 47th court. The evidence, we think, shows that there was due on the contracts for the sale of said three lots the full amount claimed by the plaintiff after applying the payments by the purchasers, when made, as between principal and interest in accordance with the provisions of the contracts of sale.

The contention of defendant in error is that the guaranty is a collateral and not an absolute guaranty, and that therefore the plaintiff was required to promptly notify the defendant of the principal's default. In this contention we cannot concur. The debts guarantied were existing debts created by the contracts of sale, and there was not, as in *Taussig v. Reid*, 145 Ill. 488, a doubt whether a debt would ever exist to which the guaranty could apply. By the terms of the guaranty the liability of the defendant was primary and for the payments, "in accordance with the terms of each respective contract." It was the duty of the defendant to see that the payments were made by the persons with whom he had contracted to sell the lots. *Voltz v. Harris*, 40 Ill. 155; *Dickerson v. Derickson*, 39 Ill. 574; *Pfaelzer v. Kau*, 207 Ill. 116.

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If on any ground the guaranty can be held a collateral and not an absolute guaranty, then, unless the evidence shows that defendant suffered loss or injury by want of notice, he is liable on such guaranty. The evidence does not show that he suffered loss or injury for want of notice. All that is shown is that interest accumulated on the contracts, but that is the case whenever a person guaranties in writing the payment of money.

We think the evidence shows a right of recovery of the full amount claimed, and the judgment is reversed with judgment here for \$449.31 and costs for the plaintiff.

Reversed and judgment here.

Josiah Burnham, Defendant in Error, v. Willis P. Dickinson, Plaintiff in Error.

Gen. No. 20,451. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

Statement of the Case.

Action by Josiah Burnham against Willis P. Dickinson for professional services rendered as a lawyer. From a judgment for two hundred dollars against defendant in favor of plaintiff, defendant brings error.

Plaintiff's claim was for legal services rendered in prosecuting a writ of error in the Appellate Court to reverse a judgment recovered by O'Brien against the Concord Apartment House Company and in prosecuting an appeal in that case to the Supreme Court. Plaintiff testified that after the expiration of five years

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from the rendering of the services defendant said to him that he would pay him the balance of his account; "that he would pay me what was due me." Defendant contended that the claim of plaintiff for the services in question was paid and discharged by Claney interested as a surety. Plaintiff testified that he told Claney when he made his last payment that he would let him off on payment of seventy-five dollars, as he was only interested as a surety in the appeal bond, but he would not abate a penny from the amount of his bill.

W. O. ROBINSON, for plaintiff in error.

EDWARD T. BARNARD, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. LIMITATION OF ACTIONS, § 79*—*when new promise sufficient to prevent statutory bar.* In an action to recover for professional services rendered as a lawyer in prosecuting a writ of error and an appeal against a third party, evidence *held* sufficient to take the case out of the statute of limitations, where it appeared defendant, after the expiration of five years from the rendering of the last services, made a new promise to pay for the same.

2. PAYMENT, § 29*—*insufficiency of evidence to establish.* In an action for professional services rendered as a lawyer in prosecuting a writ of error and appeal, evidence *held* insufficient to show payment for such services.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Tauflek N. Kotite and Naman S. Farhood, trading as
Kotite & Farhood, Defendants in Error, v. The Title
Guaranty & Surety Company, Plaintiff in Error.**

Gen. No. 20,515.

1. **APPEAL AND ERROR, § 1870***—*ineffectiveness of delivery of property to execution debtor to release surety on stay bond.* Where under the Municipal Court Act, sec. 23, par. 1 (J. & A. ¶ 3335), a judgment debtor files a stay of execution bond, conditioned for the prosecution of a writ of error with effect, and to pay the amount of the judgment, costs, interest and damages rendered and to be rendered in case of affirmance, held that the fact that the bailiff on the filing of the bond delivered property levied upon to the execution defendant did not release the surety.

2. **APPEAL AND ERROR, § 1859***—*when surety is estopped to deny binding effect of stay bond.* In an action upon a stay bond used by a judgment debtor to procure a review in the Appellate Court of a judgment against him, the principal and his surety are estopped from denying the binding character of the obligation.

3. **APPEAL AND ERROR, § 1852***—*sufficiency of consideration for stay bond.* A stay bond on an execution given to secure the review of a judgment in a higher court is supported by a sufficient legal consideration, the execution of the bond not being contrary to statute or the policy of the law.

4. **APPEAL AND ERROR, § 1850***—*when validity of statute cannot be raised.* Where a stay bond is given under the Municipal Court Act, sec. 23, par. 1, (J. & A. ¶ 3335), to review a judgment by a judgment debtor in an action on a bond, the surety cannot raise the question of the unconstitutionality of the statute.

5. **MUNICIPAL COURT OF CHICAGO, § 13***—*when judgment may be entered on striking affidavit of defense.* Where an affidavit of merits filed in the Municipal Court fails to state a good defense to an action, the proper procedure is to strike the affidavit from the record and to enter judgment on the plaintiff's affidavit of claim as in case of default.

6. **COSTS, § 8***—*when damages permissible for prosecution of writ of error for delay.* Where a writ of error is prosecuted for delay, the Appellate Court may affirm the judgment with an assessment of damages and costs.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kotite et al. v. The Title Guaranty & Surety Co., 191 Ill. App. 555.

Error to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed with damages and costs. Opinion filed March 8, 1915.

GEORGE D. KIMBALL, for plaintiff in error; FRANCIS E. HINCKLEY, of counsel.

HARRY J. MYERSON and DON C. WRAY, for defendants in error.

MR. JUSTICE BAKER delivered the opinion of the court. Plaintiffs Kotite and Farhood recovered a judgment in the Municipal Court against one Gazelle for \$297.55 and costs April 11, 1912. Gazelle then gave a stay bond with the defendant as surety in the penal sum of \$500, conditioned that if Gazelle "shall duly prosecute said writ of error with effect, and moreover pay the amount of the judgment, costs, interest and damages rendered, and to be rendered, against him in case the said judgment shall be affirmed in said Appellate Court, then the above obligation to be void, otherwise to remain in full force and virtue." The judgment against Gazelle was affirmed by this court February 2, 1914. This action was then brought against plaintiff in error, the surety in the bond, and plaintiff had judgment for \$342.30. The only ground of reversal argued in the brief of plaintiff in error is that the surety was released from the obligation because the bailiff, on the filing of the stay bond, delivered possession of the property levied on to the defendant in the execution. We think it was the duty of the bailiff to return the property to the judgment debtor when the stay bond was given. Paragraph 1 of section 23 of the Municipal Court Act (J. & A. ¶ 3335) provides that a party who may desire to obtain a review of a judgment and also desires a stay of execution may obtain a stay of execution for ninety days by the giving of a bond with surety conditional for the prosecution of such writ of error, and otherwise as near as may be as an appeal

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bond in case of an appeal from a judgment of a Circuit Court.

The judgment debtor used the bond here sued on to procure a review by this court of the judgment against him, and the surety by joining in the bond enabled him to do so, and having obtained all the benefit of the bond, they should be estopped from denying that it is a binding obligation.

Mix v. People, 86 Ill. 329, where it was said:

"The bond was voluntarily executed. It was executed in consideration of the appeal, and the effect of the appeal was to stay proceedings on the judgment. This was a sufficient legal consideration; and, since the execution of the bond was neither prohibited by statute nor is contrary to the policy of the law, it is a good common law obligation. As we said in *Courson v. Browning*, 78 Ill. 210, *Mix* 'used this appeal bond to procure a trial in this court, and his security enabled him to do so by joining in its execution; and, having obtained all the benefits of the bond, they should be estopped from denying that it is a binding obligation, unless it contravenes some statute or some rule of public policy, neither of which was done by the execution of this bond.' "

See also *Meserve v. Clark*, 115 Ill. 580; *Daniels v. Tearney*, 102 U. S. 415.

The case is not one where the plaintiff in the execution releases property levied on. Admitting that the law providing for the giving of a stay bond is unconstitutional, the plaintiff in error cannot aver its unconstitutionality as a defense. *Mix v. People* and *Daniels v. Tearney*, *supra*.

Our conclusion is that the amended affidavit of defense fails to show a defense to the action and was properly stricken from the record and judgment entered on plaintiff's affidavit of claim as in case of default. We further think that this writ of error is prosecuted for delay.

The judgment is affirmed with \$22 damages and costs.

Affirmed with damages and costs.

City of Chicago, Defendant in Error, v. Charles Montgomery, Plaintiff in Error.**Gen. No. 20,536.**

1. DRUGGISTS, § 6*—*when burden of showing sale of cocaine not unlawful on defendant.* In a proceeding under Chicago Code of 1911, sec. 808, for the sale of cocaine, the burden of proving that the sale was within the exception of the provision because made upon a physician's prescription is upon the defendant.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when error in complaint in quasi criminal case not ground for reversal.* A proceeding under Chicago Code of 1911, sec. 808, is a quasi criminal case belonging to the fifth class, in which no written pleadings are necessary, and a typographical error in the complaint in stating the year in which the sale was made as "194" instead of "1914" is not ground for reversal, where the evidence shows that the sale was made in 1914 and objection on the ground of variance was made at the trial.

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in this court at the October term, 1914. **Affirmed.** Opinion filed March 8, 1915.

EDWARD H. MORRIS, for plaintiff in error.

JOHN W. BECKWITH and ALBERT J. W. APPELL, for defendant in error; ULYSSES S. SCHWARTZ, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

This writ of error brings in review a judgment for one hundred and fifty dollars against plaintiff in error, Charles Montgomery, for a violation of section 808 of the Chicago Code of 1911, which is as follows:

"Sec. 808. No druggist or other person shall sell or give away any morphine, cocaine, alpha or beta eucaine, chloral hydrate, or any salt or compound or derivative of any of the foregoing substances, or any substance, preparation or compound containing any of the foregoing substances, or any of their salts or com-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

pounds or derivatives, except upon the written prescription of a duly registered physician.

Any person who shall violate any of the provisions of this section shall be fined not less than fifty dollars nor more than two hundred dollars for each offense."

The contention of plaintiff in error is that the burden was on the defendant to prove that the sale of cocaine was made without a written prescription signed by a duly registered physician, and that the evidence failed to prove that the sale was made without such prescription. This contention cannot be sustained. The burden of proof was on the defendant to show that the sale was within the exception stated in the ordinance—not on the plaintiff to show that it was not within such exception. The Dramshop Act of this State provides that:

"Whoever, by himself, or his agent or servant, shall sell or give intoxicating liquor to any minor without the written order of his parent, guardian or family physician, * * * shall be fined not less than twenty dollars," etc. (J. & A. ¶ 4605).

In prosecutions under this act it was held in the following cases that when a sale is shown by the prosecution, the burden is shifted upon the accused to show that the sale proven was made on the written order of the parent, guardian or family physician; *Birr v. People*, 113 Ill. 645; *Harbaugh v. City of Monmouth*, 74 Ill. 367. See also, *State v. Clinkenbeard*, 142 Mo. App. 146; *State v. Elam*, 21 Mo. App. 291; *State v. Miller*, 24 Conn. 522; *Shelp v. U. S.*, 26 C. C. A. 570, 81 Fed. 694.

People v. Hustion, 178 Ill. App. 293, does not support the contention of plaintiff in error. That was a criminal prosecution. The information charged the sale of cocaine to a certain person without such person "having in his possession a written prescription signed by a duly registered physician." The statute did not require that the person purchasing the cocaine should

Williams v. Assets Adjustment Co., 191 Ill. App. 560.

have the prescription in his possession, and the court held that the information did not therefore set out an offense. In this case the burden of proof was on the defendant to show that the sale of cocaine was within the exception stated in the ordinance.

The court did not err in refusing to strike plaintiff's statement of claim. Quasi criminal cases belong to the fifth class, and cases of that class are determined without written pleadings. Municipal Court Act. sec. 2, par. 5, and section 3 (J. & A. ¶¶ 3314, 3315); *Hopkins v. Levandowski*, 250 Ill. 372.

The manifest mistake in alleging in the complaint that the sale was made March 23, "194," is no ground for reversal. No written complaint was necessary. The evidence shows that the sale was made March 23, 1914, and no objection on the ground of variance was made on the trial, and such typographical errors are not ground for reversal. *Russell v. Brown*, 41 Ill. 183.

We find no error in the record and the judgment is affirmed.

Affirmed.

George L. Williams, Appellee, v. Assets Adjustment Company, Appellant.

Gen. No. 20,562. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

Statement of the Case.

Bill by George L. Williams against Assets Adjustment Company, a corporation, to compel the defendant to deliver to complainant two promissory notes

made by complainant and one Osby and to enjoin defendant from disposing of said notes or attempting to collect complainant's wages under an assignment thereof, and that his employer be directed to pay such wages to complainant.

From a decree granting the relief sought which recited that the cause was heard on the bill, the answer and the proofs taken in court, the defendant not appearing by counsel or otherwise, defendant appeals.

JULIAN C. RYER, for appellant.

H. C. DAWSON, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. EQUITY, § 295*—*when filing of replication waived.* When the record does not show that a cause was formally set for hearing on the bill and answer, and it was heard on bill, answer and proofs, the filing of a replication is waived.

2. TRIAL, § 13*—*when cause treated as at issue.* Where, after a hearing on the bill answer and proofs taken in court, defendant's attorney gives notice that he will ask that the cause be set down for rehearing and for leave to introduce evidence for defendant, he treats the cause at issue.

3. EQUITY, § 366*—*when cause treated as heard on bill and answer.* A cause will be treated as heard on bill and answer only when the decree shows that it was so heard or the record shows that the defendant gave complainant notice of the filing of his answer.

4. EQUITY, § 207*—*what effect of waiver of replication.* When the replication is waived, the findings of the decree are taken as true on appeal, and the decree will be affirmed if the findings of fact are sufficient to support it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Branderslev v. Branderslev, 191 Ill. App. 562.

Charles Branderslev, Plaintiff in Error, v. Anna Branderslev, Defendant in Error.

Gen. No. 20,585. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Bill by Charles Branderslev against Anna Branderslev, for divorce on the ground of impotency.

The evidence shows that defendant's left hip joint is fixed whereby it is impossible for the parties to have sexual intercourse in the natural and normal way, but that by lying in a certain attitude, complete intercourse could be had. Defendant testified that her hymen had been ruptured by intercourse with complainant and the medical evidence showed the existence of the rupture.

From a decree dismissing the bill for want of equity, complainant appeals.

MCMAHON & CHENEY and J. WALTER NIELSEN, for plaintiff in error

HUGH O'NEILL, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

DIVORCE, § 45—when evidence sufficient to warrant dismissal of bill for divorce on ground of impotency. Evidence in suit for divorce on the ground of impotency examined and held to warrant a dismissal of the bill for want of equity.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Sanitary Hair Goods Company, Plaintiff in Error, v.
John G. Elliott, Defendant in Error.**

Gen. No. 20,593. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by Sanitary Hair Goods Company, a corporation, against John G. Elliott to recover one thousand five hundred dollars paid defendant as attorney's fees for the prosecution of litigation for plaintiff, on the ground that defendant was negligent, unfaithful and fraudulent in conducting and prosecuting such litigation.

To reverse the judgment on a verdict directed for defendant, plaintiff prosecutes this writ of error.

SIDNEY E. LEVY, JULIUS LIMBACH and GEORGE F. ORT, for plaintiff in error.

ASHCRAFT & ASHCRAFT, for defendant in error;
CHARLES F. RATHBUN, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 81*—*when burden of proof is on client charging attorney with negligence and fraud.* Where an action is brought against an attorney to recover fees paid him, on the ground that he was guilty of negligence and fraudulent conduct in prosecuting litigation for plaintiff, the burden is on plaintiff to establish such negligence and fraud, and the evidence examined and held that the burden was not sustained.

2. ATTORNEY AND CLIENT, § 81*—*what good faith and diligence owed to client.* All that an attorney owes his client is good faith and reasonable skill and diligence in the prosecution of the case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lizzie G. Hastings and Catherine K. Heron, Defendants in Error, v. Henry Bigaro, Plaintiff in Error.

Gen. No. 20,608.

LANDLORD AND TENANT, § 200*—*when covenant requiring payment of taxes by tenant not broken.* A lease cannot be forfeited on the ground of the failure of the tenant to comply with covenant therein that he shall pay the current taxes, where he pays such taxes before any attempt is made to enforce any personal liability against the owner of the property or his assigns, although the taxes were not paid until after they had become delinquent and were bearing interest.

Error to the Municipal Court of Chicago; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in this court at the October term, 1914. Reversed with judgment here. Opinion filed March 8, 1915.

Statement by the Court. This writ of error brings in review a judgment for the possession of certain premises recovered by plaintiffs Hastings and Heron against defendant Bigaro in an action of forcible detainer in the Municipal Court. Hudson demised by written lease the premises in question to defendant for a term of ten years from April, 1911, at a rental of \$16.67 per month, payable in advance on the first day of each month. The lease contains a covenant by the lessee to pay in addition to the rent specified "current general taxes" on the demised premises. Hudson assigned the lease to the plaintiffs. The plaintiffs put in evidence a notice in writing signed by them to defendant, wherein they state that owing to the defendant's failure to pay "all general taxes" for the year 1913 on the demised premises on or before the first day of May, 1914, defendant's lease "was forfeited this 29th day of May, 1914," and possession of the demised premises is demanded "within two days from this 1st day of June, A. D. 1911." The evidence does

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

not show when this notice was served. Defendant sent plaintiffs a check for the June, 1914, rent, which they received June 1st and retained but did not deposit the same for collection. On the same day defendant paid the general taxes for 1913 on the demised premises, amounting to \$492.23.

OTTO G. KNECHT, for plaintiff in error.

JOHN HEBON, for defendants in error.

MR. JUSTICE BAKER delivered the opinion of the court.

The only question we deem it necessary to consider is as to the right of the plaintiffs to forfeit the lease May 29, 1914, for defendant's failure to pay, up to that time, the general taxes of 1913. Those taxes became a lien April 1, 1913. They became delinquent March 10, 1914. From May 1st the taxes bore interest at the rate of one per cent. per month. The statute provides that application for judgment and order of sale for taxes on delinquent lands and lots shall be made at the June term of the County Court. Section 189 of chapter 120, R. S. (J. & A. ¶ 9408) provides that the owner of any lot upon which judgment is prayed may pay the "taxes, special assessments, interest and costs due thereon to the county collector at any time before sale." Section 203 (J. & A. ¶ 9422) provides that when a lot is offered for sale and there is no bidder, it shall be forfeited to the State.

In *McFarlane v. Williams*, 107 Ill. 33, it was said by Mr. Justice Scholfield:

"The taxes were to be paid when due, and this is fixed by law. They must be paid so as to avoid a sale of the property for their non-payment, or the enforcement of any personal liability against the lessor on account thereof."

Here there could be no sale of the lot in question

Craven v. Stone Store & Office Fixture Co., 191 Ill. App. 566.

for taxes until after the second Monday of June, 1914. The statute in terms provides that the owner may pay the taxes at any time before sale. There was no attempt to enforce any personal liability against the owner of the lots, the lessor or his assigns. The fact that the taxes bear interest after May 1st is not, in our opinion, material to the inquiry as to when the plaintiffs could forfeit the lease for the failure of the lessee to pay the taxes. We think that under the rule stated in *McFarlane v. Williams, supra*, in the absence of any attempt to enforce the personal liability of the owner of the premises or his assigns, the lessee could pay the taxes at any time before sale, and that the lessor or his assigns could not forfeit the lease for failure to pay taxes before sale.

It follows from what has been said that in our opinion the judgment should have been a judgment of *nil capiat*, and the judgment is reversed and a judgment of *nil capiat* entered here and for the costs in this court and in the Municipal Court.

Reversed with judgment here.

Harry W. Craven, trading as The Hollister Drug Company, Defendant in Error, v. Stone Store & Office Fixture Company, Plaintiff in Error.

Gen. No. 20,640. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by Harry W. Craven, trading as The Hollister Drug Company, against Stone Store & Office

Craven v. Stone Store & Office Fixture Co., 191 Ill. App. 566.

Fixture Company to recover \$105, the amount paid by plaintiff to defendant for certain goods.

The evidence showed that the goods were purchased at an agreed price of \$105 on September 13, 1913, and that defendant stated that they would be shipped to him in Idaho in a week; that plaintiff paid \$30 on account; that in November, 1913, or February, 1914, the remainder of the contract price was paid on the representation that the payment was necessary in order to secure from the forwarding company a rate less than the railroad rate; that in reply to plaintiff's inquiry on February 18, 1914, defendant informed him that the goods had been shipped; that plaintiff at the time told the defendant that if they had not been shipped he did not wish them, and was again informed that they had been shipped; that he requested the invoice and was told it had been mislaid; that the goods were not delivered to the forwarding company until February 19, 1914, that on February 19, 1914, defendant, after having asked for the invoice, was told it had been sent to Idaho; that thereafter he found the goods in the possession of the forwarding company and directed that they be not shipped.

To reverse a judgment for plaintiff for \$105, defendant prosecutes this writ of error.

BLUM & BLUM, for plaintiff in error.

ELMER M. LIESSMANN, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 124*—*when reasonable time for delivery a question of fact.* In an action by a purchaser to recover the purchase price of goods, where it appears that he had bought them on November

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Quinlan v. The Almini Co., 191 Ill. App. 568.

13, 1913, the defendant stating that they would be shipped in a week, and that on February 18, 1914, plaintiff informed defendant that if they had not been shipped he did not wish them, the question whether a reasonable time for the delivery had elapsed before the countermand is one of fact.

2. SALES, § 128*—*what delivery not sufficient to vest title in purchaser.* The delivery of goods by the seller to a forwarding company to be shipped to the purchaser does not vest title in the purchaser, where such delivery is not made in a reasonable time.

3. SALES, § 117*—*when demand not necessary in action to recover back purchase price.* In an action to rescind a contract and recover the purchase price, where the goods were not delivered in a reasonable time, no demand is prerequisite.

4. CONTRACTS, § 261*—*when evidence sufficient to show right to rescind.* Evidence examined and held to show that plaintiff had the right to rescind and did rescind before bringing an action to recover the purchase price paid for goods.

P. R. Quinlan, Defendant in Error, v. The Almini Company, Plaintiff in Error.

Gen. No. 20,654. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

Statement of the Case.

Action by P. R. Quinlan against The Almini Company, a corporation, to recover a balance of \$68.05 for flowers purchased by defendant.

The facts showed that the flowers were purchased on October 1, 1912, by one Hahn, who was the manager of a branch of the original Almini Company, for the carrying out of a contract which his company had in the city in which the branch was located.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

There was evidence that the charter of the defendant states that it "is formed for the purpose of continuing and taking over one of the same name." The evidence also showed that the president of the defendant, who owned seventy-four per cent. of its stock, was also president of the original company. It was also shown that by an agreement between the three stockholders owning all of the stock in defendant, made February 17, 1913, it was recited that the original company was owner of the goods, accounts, etc., in the branch store and it was agreed that defendant should pay the debts incurred by the branch store before October 1, 1912, and that Hahn should assume those incurred thereafter.

To reverse a judgment for plaintiff for \$68.05, defendant prosecutes this writ of error.

GEORGE W. WILBUR, for plaintiff in error.

BAKER & HOLDER, for defendant in error; W. W. HOOVER, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 380*—*when evidence sufficient to show ratification of act of agent.* In an action against a corporation to recover the purchase price of flowers bought by an agent of its predecessor to fulfil a contract which such predecessor had for the decoration of a hotel, evidence of one who was the president of the predecessor when the contract was made that the agent had made the contract for the decorating, that he had authority to buy what was necessary to fulfil the contract and that the principal office of the predecessor had received payment from the hotel under the contract of the agent, is sufficient to show that the purchase by the agent had been ratified by his principal.

2. CORPORATIONS, § 597*—*when debt assumed by succeeding corporation.* Where the holders of all the stock of a succeeding corpo-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lukasik v. International Harvester Co., 191 Ill. App. 570.

ration agree to assume all the debts incurred by a branch of its predecessor before October 1, 1912, and that a third person should assume the debts incurred after that date, a debt incurred by such branch on October 1, 1912, is assumed by the corporation.

3. CORPORATIONS, § 597*—*where evidence sufficient to show succession to another corporation.* Evidence which shows the identity of name of a second corporation with a first, that the second had the same president as the first, that it carried on a business of the same character as the first and by agreement of the stockholders took the goods, accounts, etc., and assumed the debts of a branch of the first from a certain date, and that the charter of the second recited that it was "formed for the purpose of continuing and taking over one of the same name," is sufficient to warrant a finding that the second was a successor of the first.

4. CORPORATIONS, § 325*—*when contract intra vires.* Where the charter of a corporation authorizes it to carry on all kinds of interior decorations, it may if necessary to complete a contract for decorating, buy flowers to be used for that purpose.

Simon Lukasik, Appellee, v. International Harvester Company et al., on appeal of International Harvester Company, Appellant.

Gen. No. 20,692. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of facts. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

Statement of the Case.

Action on the case by Simon Lukasik against International Harvester Company and others for alleged negligence whereby plaintiff, who was in defendant's employ, sustained a personal injury.

The declaration, in a single count, averred that the defendant was engaged in the manufacture of harves-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ters; that plaintiff was in its service; that defendant negligently failed to provide a sufficient number of competent servants to assist the plaintiff in rolling and placing a certain wheel, and negligently ordered the plaintiff and one other servant to take the wheel, which was large and heavy, and roll it from the workshop and place it up against other wheels in defendant's yard, all of which dangerous and unsafe condition was known to the defendant, or by the exercise of reasonable care could have been known to it, and was not known to the plaintiff, nor by the exercise of reasonable care could he have known it; that in consequence, when the foreman of defendant ordered plaintiff to take the wheel from the shop and place it against other wheels in the yard, and when plaintiff and one other servant of the defendant took the wheel and rolled it out of the workshop and up to where such other wheels were stacked and attempted to let the wheel down to rest against the other wheels, owing to the great weight of the wheel they were unable to hold the wheel and it fell, slipped and glided upon the plaintiff's foot and leg, and the narrowness of the place hindered and prevented the plaintiff from getting out of the way of the falling wheel, whereby plaintiff was injured.

From the evidence it appeared that the wheel plaintiff and the other man were ordered to take from the shop was a fly wheel that had been rejected, and weighed about 1,000 pounds. Rejected gear wheels of about the same weight had been taken from the shop to the platform by plaintiff and another man. The difference between the two kinds of wheels was that the gear wheels had teeth or cogs in the surface of the rim, while fly wheels were smooth. In both kinds of wheels a hub projected from the wheel two or three inches. There was an abundance of wall space in the yards, but five or six wheels were placed one in front

Lukasik v. International Harvester Co., 191 Ill. App. 570.

of another just outside the door of the shop. The first wheel was so placed as to lean against the wall and the second so as to lean against the first, and so on to the sixth. Because of the projecting hubs it was necessary to place the rim of a wheel some little distance from the wheel against which it was to lean, and necessarily the angle of inclination increased with each wheel so placed. It was not alleged in the declaration that the wheels were negligently or improperly placed, but only that owing to the great weight of the wheel which plaintiff and the other man were attempting to put in place they were unable to hold the wheel and it fell on plaintiff's foot and injured him. Plaintiff contended that defendant was guilty of negligence in not furnishing one or more additional men to assist in placing the wheel.

From a judgment for plaintiff for five hundred dollars, defendant International Harvester Company appeals.

DAVID A. OREBAUGH, for appellant; EDGAR A. BANCROFT, of counsel.

S. P. DOUTHART and GUERIN & BARRETT, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 347*—*when servant assumes risk of known danger.* In an action by a servant for injuries alleged to have been caused by the master's failure to furnish sufficient assistance to the servant to aid him in his work of moving a fly wheel whereby the wheel fell and inflicted the injury complained of, where the evidence shows that plaintiff had previously moved similar wheels, that he knew the character and weight of such wheels and the strength and efficiency of the employee who was assisting him, he will be held to have assumed the risk of the injury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Luster v. Steingard, 191 Ill. App. 573.

2. MASTER AND SERVANT, § 537*—*when failure to inspect cannot be urged when not alleged in declaration.* In an action by a servant against a master to recover for personal injuries, where the declaration does not allege any failure of the master to inspect, plaintiff cannot contend that defendant was negligent in that regard.

**Max Luster, Plaintiff in Error, v. Arthur Steingard,
Defendant in Error.**

Gen. No. 20,710. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed March 8, 1915.

Statement of the Case.

Action by Max Luster against Arthur Steingard to recover for services rendered in defending an action against defendant.

To reverse a judgment for defendant for two thousand dollars on the verdict of the jury, plaintiff prosecutes this writ of error.

ERNEST C. RENIFF, for plaintiff in error.

No appearance for defendant in error

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

ATTORNEY AND CLIENT, § 133*—*when burden on defendant to show negligence in action by attorney for services.* In an action by an attorney to recover for services rendered in defending an action against defendant, where the defense is plaintiff's negligence, the burden of showing such negligence is on defendant; and where no evidence of negligence is offered, but the jury finds a verdict for defendant, plaintiff's motion for a new trial should be granted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Antonio Mennella for use of Joe Mennella, Defendant
in Error, v. Michael Bottigliero, Plaintiff in Error.**

Gen. No. 20,740.

1. GARNISHMENT, § 9*—*when record on writ of error insufficient for failure to show judgment and return of execution.* On a writ of error by a garnishee, the judgment will be reversed where there is no evidence in the record of a judgment against the nominal plaintiff or of the issue of an execution and the return thereof by the proper officer, "no property found."

2. APPEAL AND ERROR, § 13*—*when sufficiency of evidence to support judgment reviewable on writ of error to reverse judgment against garnishee.* Section 81 of the Practice Act as amended by the Act of May 31, 1911 (J. & A. ¶ 8618), does not prevent the Appellate Court from reviewing, on a writ of error to reverse a judgment against a garnishee, the sufficiency of the evidence to support the judgment, where the stenographic report shows that defendant submitted to the court the question whether, on the evidence, plaintiff was entitled to judgment against him, even though there was no formal exception to the judgment.

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed March 8, 1915. Rehearing denied and opinion modified March 22, 1915.

MORGAN, McFARLAND & GOODMAN, for plaintiff in error; JAMES H. McFARLAND, of counsel.

BLUM & BLUM, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

In an action in garnishment in the Municipal Court by Mennella, plaintiff, against Bottigliero as garnishee, tried by the court without a jury, plaintiff had judgment for \$862 and the garnishee sued out this writ of error. There is in the record what is certified by the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

trial judge to be a "full, true and correct stenographic report of all the evidence introduced or offered and of all the proceedings in the cause." There is no evidence in the record of a judgment against the nominal plaintiff or of the issue of an execution and the return thereof by the proper officer, "no property found." As was said by Mr. Justice Adams in *Farnum v. North Chicago Safety Deposit Vault Co.*, 97 Ill. App. 439, after quoting section 1, chap. 62, R. S. (J. & A. ¶ 5936).

"The proceeding is statutory and can not be extended beyond the plain provisions of the statute." *Illinois Cent. R. Co. v. Weaver*, 54 Ill. 319; *Webster v. Steele*, 75 Ill. 544, 546; *Bartell v. Bauman*, 12 Ill. App. 450; *Netter v. Board of Trade*, 12 Ill. App. 607; *Drake on Attachments* (5th Ed.) 451a. "By the statute quoted *supra*, it is clearly necessary that before process of garnishment on a judgment can legally issue there shall be a return of the execution issued on the judgment, 'no property found.'"

Defendant in error does not controvert the rule that to maintain a proceeding in garnishment it is incumbent on the plaintiff to prove a judgment and the issue and return of an execution "no property found," but contends that as the record shows no exception to the judgment by the garnishee, the question of the sufficiency of the evidence to support the judgment cannot now be inquired into by this court. This was the rule prior to the amendment to the Practice Act, which took effect July 1, 1911. *Blake v. De Jonghe Hotel & Restaurant Co.*, 263 Ill. 471; *Lassers v. North-German Lloyd Steamship Co.*, 244 Ill. 570; *Climax Tag Co. v. American Tag Co.*, 234 Ill. 179.

The stenographic report not showing an exception to the judgment in the present case, the question whether we can consider the question whether the evidence is sufficient to support the judgment depends on the Amendment of 1911 to section 81 of the Practice Act

(J. & A. ¶ 8618), for if we can consider that question we can do so only under and by virtue of such amendment. In the Amendment to section 81 of the Practice Act approved May 31, 1911, the following new clause appeared as the first clause of the section:

"If, during the progress of any trial in any civil or criminal cause, either party shall submit to the court any matter for a ruling thereon and the court shall rule adversely to the party submitting the same, such ruling shall be deemed a matter for review in any court to which the same cause may be thereafter taken upon appeal or by writ of error without formal exception thereto, and after judgment, at any time during the term of the court at which judgment was entered or within such time thereafter as shall, during such term, be fixed by the court, any party desiring to prosecute a writ of error to or appeal from any such judgment, may submit to the court a stenographic report of the trial containing the evidence and the rulings of the court upon all or any of the questions submitted to and ruled upon by the judge thereof, and he shall examine the same, and, if correct, officially certify to the correctness of such report, and the same shall thereupon be filed in said court and become a part of the record in said cause, and all matters and things contained in such stenographic report shall become as effectually a part of said record as if duly certified in a formal bill or bills of exceptions, or * * *."

The record in the present case contains a stenographic report, and the question whether we may review the evidence in the absence of a formal exception to the judgment in a case where there is a bill of exceptions and not a stenographic report, is not before us. The stenographic report states that the plaintiff to maintain the issues on his part introduced certain evidence; that the defendant to maintain the issues on his part introduced certain evidence; and that when defendant rested, the court gave judgment for the plaintiff. This shows that the defendant submitted to the court the question whether on the evidence the plaintiff was entitled to judgment against him, and that

Abbau et al. v. Grassie et al., 191 Ill. App. 577.

the court on that matter ruled adversely to the defendant. We think that under the statute above quoted the ruling of the court on the question so submitted to it was a matter of review by this court without any formal exception to the judgment. Some of the questions here presented are involved in the following cases: *Photo Cines Co. v. American Film Mfg. Co.*, 190 Ill. App. 124; *Miller v. Anderson*, 189 Ill. App. 72; *Meek v. Chicago Rys. Co.*, 183 Ill. App. 256.

The evidence touching the question whether the garnishee had any funds in his hands due to the nominal plaintiff is conflicting and unsatisfactory; but as the judgment must be reversed for want of evidence of the judgment and the return of execution "no property found," it is not necessary for us to decide whether the evidence shows or fails to show any money due to the nominal plaintiff from the garnishee.

For the reason indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

**John Abbau and Herbert Whittaker, Appellees, v.
James E. Grassie, Trustee, and James E. Grassie,
Individually, Appellant.**

Gen. No. 20,751.

1. MECHANICS' LIENS, § 196*—*when evidence sufficient to support findings of master.* Evidence in proceeding to enforce mechanic's lien held to support findings of master.

2. MECHANICS' LIENS, § 128*—*how far mortgage lien preferred.* Under section 16 of the Lien Act (J. & A. ¶ 7154) a prior mortgage lien is entitled to preference to the extent of the value of the land at the time of the making of the contract, the mechanic's lien creditor being preferred to the value of the improvements erected on the premises.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abhau et al. v. Grassie et al., 191 Ill. App. 577.

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

JULE F. BROWER and SAMUEL B. KING, for appellant.

ROBERT W. DUNN, for appellee John Abhau.

MR. JUSTICE BAKER delivered the opinion of the court.

The appeal in this case was taken to the Supreme Court on the alleged grounds that section 4 of the Mechanic's Lien Act of 1903 (J. & A. ¶ 7142) was unconstitutional and the ordinance requiring a contractor to take a contractor's license invalid. Abhau contended on the hearing that said ordinance was invalid, but contended further that conceding its validity, the burden of proving that he had not procured such a license was on Grassie. *Abhau v. Grassie*, 262 Ill. 636. No evidence was offered to show either that Abhau had or did not have a license.

While other lots are mentioned in the pleadings and other parties appeared in the court below, the only property involved in this appeal are Lots 24, 25 and 27 in Block 1 in Huling's Subdivision, and the only parties now interested in the case are appellee Abhau and appellant Grassie. The amount due the intervening petitioner Whittaker is included by the decree in the amount found due Grassie, and Grassie and Whittaker are given a concurrent lien on said three lots therefor. The chancellor certified that the validity of the ordinance was in issue and that the appeal should go direct to the Supreme Court.

Section 4 of the Lien Act prescribes the conditions under which a contractor may abandon the work and enforce his lien for the value of the work done.

It was held by the Supreme Court that Ida Rahn, the owner of the premises, and Abhau, the contractor, agreed that the work be stopped; that this was not an abandonment or discontinuance of the work as

those terms are used in said section 4, and that the question of the validity of the provisions of section 4 relating to abandonment or discontinuance was not involved. It was further held by the Supreme Court that the question of the existence of the license being only collaterally involved, the license will be presumed unless proof to the contrary is presented, and that the validity of the ordinance above mentioned was not involved in the case. The master by his report found that the value of the work done by Abbau on each of said Lots 24, 25 and 27 was \$3,020; that the proportionate share of general payments applicable to each of said lots was \$1,056.32, leaving the sum of \$1,963.68 unpaid for work done on each of said lots; that the value of each of said lots at the time the work thereon was begun was \$400; that each of said lots was subject to the lien of a trust deed given by Ida Rahn to Grassie as trustee to secure her note for the sum of \$2200, and that Grassie is the owner of said notes. The court overruled the exceptions to the master's report and we think the report is in accordance with the proofs. The court by the decree found that the complainant Abbau has a first lien on each of said Lots 24, 25 and 27 for \$1,963.68.

The decree denies any relief to appellant Grassie under his mortgage lien on said lots.

In this we think the court erred. Under the provisions of section 16 of the Lien Act (J. & A. ¶ 7154), Grassie's lien should be preferred to the extent of the value of the land at the time of the making of the contract, and Abbau, the lien creditor, should be preferred to the value of the improvements erected on said premises. The decree as to all other matters is affirmed.

The decree of the Superior Court is reversed and the cause remanded to that court with directions to enter a decree in accordance with the views here expressed.

Reversed and remanded with directions.

Ciemelowski v. Novak et al., 191 Ill. App. 580.

**Tillie Ciemelowski, Defendant in Error, v. John Novak
and Jennie DeRocher, Plaintiffs in Error.**

Gen. No. 20,767.

1. JUDGMENT, § 146*—*when engagement of counsel in another court not ground for setting aside judgment by default.* The fact that defendant's counsel was engaged in another court when the case was reached for trial is not ground for setting aside a judgment by default.

2. APPEAL AND ERROR, § 1858*—*when obligors on appeal bond liable.* Where the defendant in whose behalf an appeal bond is given under the Insolvent Debtors' Act (J. & A. ¶ 6223) fails to prosecute his appeal with effect, but permits it to be dismissed and, after the dismissal, does not appear and surrender himself into custody at the proper time, there is a breach of these conditions of the bond which renders the obligors liable on the bond for the amount of the damages sustained by the plaintiff.

3. APPEAL AND ERROR, § 1886*—*what judgment on appeal bond proper.* On a breach of the conditions of an appeal bond, both the surety and the principal become absolutely liable for the damages, and on a verdict for debt and damages for the plaintiff, it is proper to enter a judgment for debt and damages, the judgment for debt to be discharged on payment of judgment for damages and costs.

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

GEORGE REMUS, for plaintiffs in error; MORRIS K. LEVINSON, of counsel.

ROBERT F. MUNSELL, for defendant in error; L. J. HAIGLER, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

This writ of error brings in review a judgment of the Superior Court on an appeal bond given by Novak as principal and DeRocher as surety to Ciemelowski,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

plaintiff, in the Superior Court. The plaintiff recovered in the Superior Court, December 21, 1912, a judgment in trespass for assault and battery against Novak and he was arrested March 7, 1913, on a *ca. sa.* issued on the judgment. He then filed a petition in the County Court for release under the Insolvent Debtors' Act, his petition was denied and he prayed and was allowed an appeal on giving bond, and the bond sued on was given. Novak filed a plea of nonassumpsit and June 30, 1914, asked leave to file pleas *puis darrein continuance*. The next day, July 1st, when the case was reached for trial, Novak failed to appear and the trial proceeded in his absence and resulted in a judgment for \$509.80 damages. July 16th the court denied his motion to file said pleas on the ground that neither of them stated a defense to the action.

We think the court did not err in refusing to set aside the judgment on the ground that defendant's counsel was engaged in another court. *Schultz v. Meiselbar*, 144 Ill. 26.

The bond sued on is not a bail bond but an appeal bond given under the Insolvent Debtors' Act. The condition of the bond is as follows:

"Now Therefore, if the said John Novak will prosecute his said appeal with effect and in case the appeal is dismissed, or the order or judgment of the said County Court is affirmed, in whole or in part, he will perform the same, and will appear before and abide whatever decision the said Appellate Court shall make in the premises, and pay all costs that may be awarded against him, the said John Novak, and also, that he will not sell or dispose of any of his estate pending the order of the said County Court, then the above obligation to be void, otherwise to remain in full force and effect."

Novak did not prosecute his appeal with effect, but permitted it to be dismissed. This was a breach of the condition of the bond. He did not, after the dismissal of his appeal, appear and surrender himself

Krause & Managan L. Co. v. Con. Adjustment Co., 191 Ill. App. 582.

into custody at the proper time. We think that the obligors were liable on the bond for the amount of damages sustained by the plaintiff. *Strohn v. Facht*, 185 Ill. App. 127; *Maher v. Huette*, 89 Ill. 495.

The surety on the appeal bond, as well as the principal, became absolutely liable to the plaintiff for the damages, and the jury properly found a verdict for plaintiff for \$800 debt and \$509.80 damages. The court properly entered judgment on the verdict for debt and damages, judgment for debt to be discharged on payment of judgment for damages and costs, and the judgment is affirmed.

Affirmed.

Krause & Managan Lumber Company, Defendant in Error, v. Consolidated Adjustment Company, Plaintiff in Error.

Gen. No. 20,369. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

Statement of the Case.

Action of the fourth class in the Municipal Court of Chicago by Krause & Managan Lumber Company, a corporation, against Consolidated Adjustment Company, a corporation, on a contract substantially like those considered in *Pritz v. Consolidated Adjustment Co.*, 189 Ill. App. 287, and *Baltimore Trust Co. v. Consolidated Adjustment Co.*, 190 Ill. App. 30.

The ground of recovery alleged by plaintiff is defendant's failure to perform the service which it contracted.

Heister v. Crane Co., 191 Ill. App. 583.

To reverse a judgment for plaintiff on the verdict of the jury, defendant prosecutes this writ of error.

DEHAVAN B. COLE, for plaintiff in error.

HARRY A. BLOSSAT, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. COURTS, § 149*—*when decision in other actions on similar contracts followed.* Contracts involved in *Pritz v. Consolidated Adjustment Co.*, 189 Ill. App. 287, and *Baltimore Trust Co. v. Consolidated Adjustment Co.*, 190 Ill. App. 30, examined and held substantially like the contract in suit and the decisions in those cases, in so far as applicable, reaffirmed.

2. CONTRACTS, § 323*—*when default in performance warrants recovery.* In an action on a contract, where the evidence justifies the finding of the jury that the defendant failed to give plaintiff the service which, under the contract, it agreed to give, whereby the object of the contract was defeated, the finding of the jury for the plaintiff will not be disturbed.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim in fourth-class case sufficient.* The statement of claim in a case of the fourth class in the Municipal Court of Chicago is sufficient if it shows the nature of the demand even though it does not designate the character of the action with technical accuracy.

A. C. Heister, Defendant in Error, v. Crane Company, Plaintiff in Error.

Gen. No. 20,432. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed March 8, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Heister v. Crane Co., 191 Ill. App. 583.

Statement of the Case.

Action by A. C. Heister against Crane Company, a corporation, for damages alleged to have been caused to plaintiff's automobile by defendant's motor truck skidding into it.

Plaintiff's claim was for damages and for loss to his business while his automobile was being repaired.

The automobile repairer by whom plaintiff's car was repaired testified as to the damage and that his bill for the repairs and two other items not connected with the accident was sixty dollars.

There was evidence as to other troubles with the car arising subsequently, but their character and the causal connection of the accident with them was not clearly shown.

Plaintiff's damages were assessed at three hundred and fifty dollars, and to reverse the judgment entered therefor defendant prosecutes this writ of error.

ALDEN, LATHAM & YOUNG, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 2*—*when verdict for injury by collision excessive*. In an action to recover for damages to plaintiff's automobile by collision with defendant's motor truck and for loss to plaintiff's business while his car was being repaired, where the evidence shows that the cost of the repairs occasioned by the accident did not amount to sixty dollars and no actual monetary loss to his business by inability to use the car is shown, a verdict for three hundred and fifty dollars is excessive.

2. EVIDENCE, § 420*—*when opinion evidence insufficient to show injury to business*. In an action to recover for losses alleged to have been caused to plaintiff's business by his inability to use his automobile while it was being repaired after a collision with defendant's truck, it is error to permit plaintiff to give an estimate of the value per day of the car to his business, but actual monetary loss must be shown.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**C. W. Kennedy, Defendant in Error, v. Great Lakes
Dredge & Dock Company, Plaintiff in Error.**

Gen. No. 20,456.

1. SHIPPING, § 7*—*what sufficient compliance with requirement of Federal statutes as to navigation by licensed pilot.* Section 4426 of the Federal statutes providing that no small craft of specified kinds shall be navigated without a licensed engineer and a licensed pilot is not violated by the fact that a licensed master of such a craft, in control of its navigation, intrusts the physical handling of the wheel to a wheelsman not having a license as pilot or engineer.

2. SHIPPING, § 7*—*when evidence not sufficient to show contributory negligence.* In an action to recover for loss of wearing apparel caused by the collision of the steamer of which plaintiff was captain with a scow in tow of defendant's tug, evidence that as the steamer was approaching the tug, which was on the wrong side of the channel, it signaled that it would hold its course and pass to the right, which was according to the rules of navigation, and that later on it repeated these signals, and that it did so hold its course, is not sufficient to show contributory negligence, even though the signals were not answered by the tug.

Error to the Municipal Court of Chicago; the Hon GEORGE J. COWING, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

KREMER & GREENFIELD, for plaintiff in error.

MENZ I. ROSENBAUM and **MAURICE ALSCHULER**, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit for loss of wearing apparel caused by the sinking of the steamer B. & C., of which he was captain, in a collision in the sanitary canal with a scow in tow of the tug McCarthy belonging to the defendant. Plaintiff had judgment for \$175.

About eleven o'clock at night, in June, the B. & C. with scows in tow was going down the canal from Chicago, while the McCarthy with two scows in tow was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kennedy v. Great Lakes Dredge & Dock Co., 191 Ill. App. 585.

going up the canal towards the city. The canal at the place of the collision runs in a northeasterly and southwesterly direction, and counsel and the witnesses describe a vessel going northeast towards Chicago as going *up*, and when going in the opposite direction as going *down* the canal. It appears from the evidence that the rule of the road for vessels navigating the canal is that each vessel shall keep to its right. In violation of this rule the McCarthy with its tows was on the northerly side of the canal, that is, the McCarthy was ascending on the left side of the canal. It was thus in the direct path of the descending B. & C., which struck the McCarthy a glancing blow on its southerly side and collided almost head-on with the first scow following, and sank.

It is conceded by the defendant that a cause of the collision was the negligence of the McCarthy in being on the wrong side of the canal. Counsel for defendant say that the sole question for this court to determine is whether the plaintiff or any member of the crew of the B. & C. was guilty of any negligence which in any way contributed to the collision. That any contributory negligence by any of the crew would bar a recovery is not controverted.

Plaintiff, a licensed master, about ten o'clock on the evening in question left the wheel in charge of James Doherty, who was not a licensed pilot but was a wheelsman with an experience of a great many years. Plaintiff went to different parts of the boat, the cabin, deck, toilet room, and was in the engine room at the time of the collision. Defendant contends that plaintiff in so doing was acting in violation of section 4426 of the Federal statutes. This section provides for the inspection of certain kinds of small craft propelled by steam, and also that "no such vessel shall be navigated without a licensed engineer and a licensed pilot," and also that in open steam launches of ten tons burden and under, one person may be both the pilot and the engineer. This statute is evidently intended to fix the official equipment as a condition under which the kinds

of vessels named shall be permitted to sail. It is not asserted that the B. & C. was not equipped officially in compliance with this statute; it had both a licensed engineer and a licensed pilot. We cannot see that this statute was intended to or does in terms cover the act of the plaintiff in leaving an experienced man at the wheel temporarily. We have examined other sections of the Federal statute but they do not seem applicable to this situation. A provision that no person shall be employed or serve "as a master, chief mate, engineer or pilot * * * who is not licensed," does not apply. It is evident that while Doherty may have had the physical handling of the wheel, plaintiff, as captain or master, was all the time in control of the navigation of the steamer, and Doherty was in no sense employed or serving as the master or pilot.

We fail to see any contributory negligence in the conduct of the plaintiff. Neither do we find such negligence on the part of the wheelsman, Doherty. The B. & C. was keeping in its proper path, and shortly before the collision had signaled to another ascending steamer, the Heath, that it would keep to the right in passing. It is a fair inference that the wheelsman of the McCarthy heard this and had notice of the approach of the B. & C. on the right side of the canal. A later signal was given by the B. & C. of its intention to pass the McCarthy on the right, but the McCarthy did not answer these signals. Under such circumstances the B. & C. would be justified in continuing in its course upon the assumption that the McCarthy would make way, but even if this were not so it certainly would have been an error, in the absence of any contrary signals from the McCarthy, for the B. & C. to have changed its course and attempted to pass on the wrong side.

Other points have been considered, but we see no reason to conclude that the finding is improper. Hence the judgment is affirmed.

Affirmed.

Kennedy v. Great Lakes Dredge & Dock Co., 191 Ill. App. 588.

Mrs. C. W. Kennedy, Defendant in Error, v. Great Lakes Dredge & Dock Company, Plaintiff in Error.

Gen. No. 20,457. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. GEORGE J. COWING, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by Mrs. C. W. Kennedy against the Great Lakes Dredge & Dock Company to recover the value of personal effects lost in the collision of a steamer and a scow in tow of defendant's tug.

Plaintiff in this case is the wife of C. W. Kennedy, defendant in error in *Kennedy v. Great Lakes Dredge & Dock Co.* (No. 20,456), *ante*, p. 585, and the collision out of which the two actions arose and the facts involved are the same.

To reverse a judgment for plaintiff for \$225, defendant prosecutes this writ of error.

KREMER & GREENFIELD, for plaintiff in error.

MENZ I. ROSENBAUM and MAURICE ALSCHULER, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

SHIPPING, § 7*—when recovery allowed for the loss of personal effects. The judgment below is affirmed for the reason stated in *Kennedy v. Great Lakes Dredge & Dock Co.*, No. 20,456, *ante*, p. 585.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mrs. E. Perelson, Defendant in Error, v. Charles F. Podolsky and Mrs. Charles F. Podolsky, Plaintiffs in Error.

Gen. No. 20,498.

1. **BILLS AND NOTES, § 441***—*when evidence sufficient to show execution of note.* Evidence held to be sufficient to show a loan of money by plaintiff to defendant and the execution therefor by defendant of the note in suit.

2. **INFANTS, § 19***—*when infancy defense to action on note.* The infancy of one of the makers of a judgment note not given for necessities is a defense as to such infant in an action on the note brought during the continuation of his infancy.

3. **INFANTS, § 23***—*when not deprived of right to disaffirm contract.* In an action against the makers of a judgment note for a loan, one of the makers being an infant, where it does not appear that the defendants have in their possession the money loaned, the infant defendant is not deprived of his right to disaffirm the obligation by the fact he received benefit from the transaction.

4. **JUDGMENT, § 199***—*when setting aside as to one defendant does not affect validity as to other.* The setting aside against one defendant of a judgment against two defendants in an action on a judgment note on the ground of his infancy does not affect its validity as against the other.

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1914. Affirmed in part and reversed in part. Opinion filed March 8, 1915. Rehearing denied March 22, 1915.

JOSEPH H. EDELSON, for plaintiffs in error; LEWIS F. JACOBSON, of counsel.

No appearance for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Judgment by confession was entered against the defendants on a judgment note signed by them. On motion to vacate, the court, after hearing testimony, denied the motion.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Perelson v. Podolsky et al., 191 Ill. App. 589.

By their testimony defendants sought to prove that the money for which they signed the note was a present to them from the plaintiff and that they thought they were signing simply a receipt instead of a note. Plaintiff denied that she gave the money as a gift to the defendants, and said it was a loan to them. We see no sufficient reason to disagree with the conclusion of the trial court in finding with the plaintiff on this question of fact. While the judgment is proper as to the defendant Mrs. Charles F. Podolsky, there was an adequate defense shown by Charles F. Podolsky, namely, his infancy when he signed the note. That he was a minor at this time, and still was a minor at the time of the trial, is undisputed. In the opinion in *Cole v. Pennoyer*, 14 Ill. 158, is a discussion as to what contracts by an infant are void or only voidable and the conclusion is stated thus: "The only contract binding on an infant is the implied contract for necessities; the only act which he is under a legal incapacity to perform, is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable, by turn, at his election." No later decision has changed this rule, but rather it has been followed in numerous cases. It follows, therefore, that the power of attorney in the note was absolutely void as to Charles F. Podolsky.

We are not favored with any brief on behalf of the defendant in error, but if it should be said that the trial court was moved to hold the judgment good as to Charles F. Podolsky because no equitable reason appeared for relieving him from his undertaking, it is sufficient to reply that this is not a case for the application of equitable considerations. The defendants did not have in their possession the money obtained from plaintiff and, as is said in *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, "the consideration, or such part of it as remains in the possession or control of the minor, must be returned, but if he has lost or expended it, so that he cannot restore it, he is not obliged to make

restitution." And the same case is authority for the statement that while a minor's disaffirmance of his obligation may operate injuriously and unjustly against the other party, the right to disaffirm exists for the protection of the infant against his own improvidence and may be exercised entirely at his discretion. The reason why the fact that an infant has received benefit should not deprive him of his right to disaffirm his obligation is stated in the opinion in *Coe v. Moon*, 260 Ill. 76, 83: "To give effect to an infant's disaffirmance of his contract it is not necessary that the other party be placed in *statu quo*, for if the law in every case required restitution of the consideration as a condition precedent to the disaffirmance of a contract, it would often result in accomplishing indirectly what it expressly says shall not be done directly, and the purpose of permitting infants to avoid their contracts might often be thus defeated."

Charles F. Podolsky having elected to disaffirm his obligation on the ground of his infancy, the trial court should have vacated and set aside the judgment against him. However, it does not follow that the judgment must be regarded as a unit, and if set aside as to one defendant must be set aside as to all. The exception to the usual rule in this respect is where one of the defendants pleads a personal defense, such as infancy, coverture, lunacy and the like. In such a case the judgment will be set aside as to him who pleads such defense, but will be held good against other defendants. *Briggs v. Adams*, 31 Ill. 486. Where a judgment is entered against an adult and an infant, the fact that the judgment is void as to the infant cannot invalidate the judgment against the adult. *Reid v. Degener*, 82 Ill. 508. See also *Lewis v. Conrad Seipp Brewing Co.*, 63 Ill. App. 345. The judgment against Mrs. Charles F. Podolsky is affirmed, and the judgment against Charles F. Podolsky is reversed.

Affirmed in part and reversed in part.

McKinney v. Metropolitan Life Ins. Co., 191 Ill. App. 592.

Maurice McKinney, Defendant in Error, v. Metropolitan Life Insurance Company, Plaintiff in Error.

Gen. No. 20,520.

1. *INSURANCE, § 232*—when error to direct verdict for plaintiff in action on life policy.* In an action by the husband of a deceased policy holder to recover on the policy, where the defense is fraudulent representation by the deceased as to her health and history and a breach of a condition in the policy rendering it void if the insured had been attended before its date by a physician for any serious disease or had had before the date of the policy any pulmonary disease, and defendant introduces evidence tending to show that a year before the date the deceased had been suffering from tuberculosis and that she continued to suffer therefrom until she died, it is error to direct a verdict for plaintiff, even though he testifies that he made a demand upon defendant for the amount of the policy, but payment was refused and he had never been paid anything by defendant.

2. *INSURANCE, § 363*—when husband or beneficiary not entitled to premiums in action on life insurance policy.* In an action on a life insurance policy brought by the husband of deceased, the defense interposed to which is fraudulent representation by deceased as to her health and history and a breach of the condition of the policy as to the health of deceased before the date of the policy, the failure of defendant to tender the premiums to plaintiff does not estop defendant from questioning their validity, the title to the premiums not being in plaintiff, either as husband or beneficiary, but in the personal representative of deceased.

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed March 8, 1915.

HOYNE, O'CONNOR & IRWIN, for plaintiff in error;
CARL J. APPELL, of counsel.

COONEY & VERHOEVEN, for defendant in error; WILLIAM FEATHER, of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

This is a suit brought by the husband of Sadie McKinney, now deceased, on two policies on her life issued by the defendant. Under a peremptory instruction a verdict was returned and judgment entered against defendant for \$321. The policies were dated September 11, 1911 and November 20, 1911, respectively, and each contained the following provision:

"Unless otherwise stated in the blank space below in a waiver signed by the Secretary, this policy is void if the insured before its date has been rejected for insurance by this or any other company, or has been attended by a physician for any serious disease or complaint; or has had before said date any pulmonary disease, or chronic bronchitis, or cancer, or disease of the heart, liver, or kidneys."

The defense interposed by the Company was, fraudulent representation by the deceased concerning her health and history, and breach of the above condition in the policies. To support this defense physicians gave testimony tending to show that the year before the issuance of the policies Sadie McKinney had been suffering from tuberculosis and that she continued to suffer therefrom until she died in May, 1912, in consequence of this disease.

Plaintiff testified that after the death of the deceased he made a demand upon the Company for the amount of the policies but that payment was refused, and that the Company never paid him anything. The court thereupon struck out all the evidence for the defendant and peremptorily instructed the jury to find the issues for the plaintiff.

We hold that in so doing the court was in error and that the case should have been submitted to the jury. Apparently the court was of the opinion that as the evidence failed to show that the defendant had tendered to the plaintiff the amount of premiums paid on the policies, it was estopped from questioning their validity. This is a misapprehension as to the law. The plaintiff, either as husband or beneficiary, was not entitled to the premiums; the title to them was in the

Gibbons v. Williams, Monicer & Co., 191 Ill. App. 594.

personal representative of the deceased. *Heubner v. Metropolitan Life Ins. Co.*, 146 Ill. App. 282; *U. S. Life Ins. Co. v. Ludwig*, 103 Ill. 305; *Massachusetts Mut. Life Ins. Co. v. Robinson*, 98 Ill. 324; *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302; *Bailey v. New England Mut. Life Ins. Co.*, 114 Mass. 177. A large number of cases has been cited touching the question as to whether there must be a return of premiums as a condition precedent to defending against the validity of a policy void *ab initio*. We do not feel called upon to express an opinion on this point, as it is not directly involved in or necessary to a decision in this case, and for the further reason that the defendant, according to statements of its counsel in its briefs, does not claim the premiums in this case and is ready to return them to the person authorized to receive them.

The defendant should have been permitted to make its defense, and the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

William C. Gibbons, Defendant in Error, v. Williams, Monicer & Company, Plaintiff in Error.

Gen. No. 20,541. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN D. TURNBAUGH, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by William C. Gibbons against Williams, Monicer & Company, a corporation, on a verbal contract for services rendered in negotiating a real estate transaction.

Defendant, while admitting that the services were rendered, denied that it had agreed to pay the amount claimed by plaintiff.

Herbert L. Joseph & Co. v. Levy, 191 Ill. App. 595.

To reverse a judgment on the verdict of the jury for two hundred and fifty dollars, defendant prosecutes this writ of error.

HARRY B. MILLER, for plaintiff in error.

WILLIAM C. GIBONS, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 92***—*when finding of jury as to amount due for services rendered not disturbed.* Where in an action for services rendered in negotiating the sale of realty, the rendering of the services is not disputed, but only the amount agreed to be paid therefor, and there is evidence tending to corroborate plaintiff's testimony as to the amount, the verdict will not be disturbed.

2. **BROKERS, § 5***—*when want of license not defense in action for services in negotiating real estate transaction.* Where an action is brought on a promise to pay for services rendered for negotiating a real estate transaction, the fact that plaintiff is not a licensed broker is no defense.

3. **APPEAL AND ERROR, § 1034***—the Appellate Court will not take judicial notice of city ordinances.

**Herbert L. Joseph & Company, Defendant in Error,
v. Sidney E. Levy, Plaintiff in Error.**

Gen. No. 20,578. (Not to be reported in full.)

ERROR to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Herbert L. Joseph & Co. v. Levy, 191 Ill. App. 595.

Statement of the Case.

Action by Herbert L. Joseph & Company, corporation, against Sidney E. Levy as guarantor on a written contract which provided for certain payments to be made to plaintiff.

The contract involved was, in part, as follows:

"In consideration of the settlement of the account of Mamie Ward, I promise to pay to Herbert L. Joseph & Co. Stock No. _____ Price \$65.00 I hereby agree to pay Herbert L. Joseph & Co., at Chicago, Ill., or their authorized agent, the sum of \$65.00 as follows: \$5.00 on 6-9-13 down and the balance in wkly installments of \$5.00 each, payable on Monday of each and every wk until paid in full."

This was followed by provisions concerning the sale and purchase of and the title and right of possession to "said property." The execution of the contract was in the following form:

"Witness my hand and seal this 4th day of June, 1913.

(Customer) Mrs. May Baker (Seal)

Address 428 S. Morgan.....Flat

(Guarantor) Sidney E. Levy (Seal)
Address 105 W. Monroe St."

Plaintiff had judgment for \$50.50, to reverse which, defendant prosecutes this writ of error.

JOSEPH D. IROSE, for plaintiff in error.

SIDNEY LYON, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. GUARANTY, § 7*—*what consideration sufficient.* The settlement of the account of the person in whose behalf a guaranty is given with the person receiving the guaranty is a sufficient consideration for the undertaking of the guarantor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Laskey v. Mendelson et al., 191 Ill. App. 597.

2. GUARANTY, § 3*—*when signature of guarantor sufficient.* The signature of a guarantor below and to the left of the signature of the person making a contract is sufficient to make him a guarantor without the addition of other words.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when filing of amendment to statement of claim not necessary.* In a case of the fourth class in the Municipal Court of Chicago, where leave is given a plaintiff to amend his statement by increasing the amount claimed, the filing of an actual literal amendment is not necessary to support a finding for the increased amount.

H. Laskey, Defendant in Error, v. Samuel Mendelson and Benjamin Mendelson, trading as Mendelson Brothers, Plaintiffs in Error.

Gen. No. 20,590. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed March 8, 1915.

Statement of the Case.

Action by H. Laskey, plaintiff, against Samuel Mendelson and Benjamin Mendelson, trading as Mendelson Brothers, defendants, to recover the purchase price of goods alleged to have been sold defendants.

Defendants' offer of evidence tending to show that the goods had been sold to other than defendants was objected to by plaintiff on the ground that the affidavit of defense contained nothing concerning a sale to another than defendants and the objection was sustained.

Judgment was rendered for plaintiff and to reverse the judgment, defendants prosecute this writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kreuser v. The Thomas B. Jeffery Co., 191 Ill. App. 598.

MOSES, ROSENTHAL & KENNEDY, for plaintiffs in error; JULIUS MOSES and SIGMUND W. DAVID, of counsel.

ISADORE S. BLUMENTHAL, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

PLEADING, § 28*—*when statement of evidence in affidavit of defense not required.* In an action for the purchase price of goods alleged to have been sold, it is error to refuse to permit defendants to introduce testimony tending to show that the goods were sold to another than defendants, even though the affidavit of defense did not set up the sale to other than defendants.

T. Anthony Kreuser, Defendant in Error, v. The Thomas B. Jeffery Company, Plaintiff in Error.

Gen. No. 20,594. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by T. Anthony Kreuser, plaintiff, against The Thomas B. Jeffery Company, a corporation, defendant, on an agreement alleged to have been made by defendant to sell plaintiff's automobile.

For plaintiff, evidence was introduced to show that in the spring of 1911 he purchased a 1910 car from defendant, a manufacturer and seller of automobiles, for which plaintiff agreed to pay one thousand five hundred dollars, and paid one thousand dollars there-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of in cash and gave his notes for five hundred dollars, due in one year, for the balance; that defendant agreed to overhaul the chassis thoroughly and to give it the same guaranty as its 1911 cars. Plaintiff also introduced testimony that the car was defective and had not been repaired or altered as defendant had agreed; that he had made many complaints to defendant's manager and had taken the car to defendant's shops many times and finally, in May, 1911, left it in defendant's garage. He further testified that in November, 1911, the manager, acting for defendant, agreed to sell the car for plaintiff for not less than one thousand two hundred dollars, and out of the proceeds to cancel the notes and pay plaintiff the balance of seven hundred dollars, or any balance that the car might bring in excess of one thousand two hundred dollars.

Defendant contended that no such agreement had been made, and correspondence of plaintiff, subsequent to the date of the alleged agreement purporting to tell the "entire story," was introduced in which no mention was made of the agreement.

Defendant's manager, who testified, made no definite denial of plaintiff's version of the conversation in which the agreement was alleged to have been made.

A former employee of defendant testified, as did plaintiff, that the car had not been given the agreed overhauling.

To reverse a judgment for plaintiff for seven hundred dollars, defendant prosecutes this writ of error.

PARKER & KING, for plaintiff in error.

H. G. COLSON, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Benko v. Lenard, 191 Ill. App. 600.

Abstract of the Decision.

1. **CONTRACTS, § 372***—*when evidence sufficient to establish agreement for sale of automobile.* In an action to recover on an agreement alleged to have been made for the sale of plaintiff's automobile, where the plaintiff's evidence as to the agreement is not only substantially uncontradicted, except in so far as it is weakened by the fact that in his letters to defendant, subsequent to the date of the alleged agreement, in which he undertook to state the circumstances of the transactions between them, plaintiff made no mention of such an agreement, but there are other facts tending to support his contention, and defendant's evidence contains no definite denial of plaintiff's evidence of the circumstances of the making of the agreement, a verdict for the plaintiff will not be disturbed.

2. **SALES, § 17***—*when consideration sufficient.* Where plaintiff purchased from defendant an automobile which was manufactured the year before, paying part of the price in cash and giving his notes due in one year for the balance, and defendant gave him the same guaranty for the car as was given for its cars for the current year, either the payment of the notes before due or release by plaintiff of defendant's guaranty would be sufficient consideration to support an agreement by defendant to sell the car for plaintiff for a minimum price and apply the proceeds to the cancellation of plaintiff's notes and pay him the balance.

3. **APPEAL AND ERROR, § 1466***—*when admission of evidence in corroboration not error.* Even though certain evidence tending to prove the consideration for a contract may not be competent, its admission is not error where plaintiff has testified fully to the same fact without objection.

BROWN, P. J. dissenting.

**Frank Benko, Defendant in Error, v. Kate Lenard,
Plaintiff in Error.**

Gen. No. 20,613. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement of the Case.

Action by Frank Benko, plaintiff, against Kate Lenard, defendant, to recover two hundred dollars paid by plaintiff to defendant as earnest money upon a contract for the purchase and sale of real estate. The contract is in part as follows:

“THIS MEMORANDUM WITNESSETH, That Kate Lenard hereby agrees to sell, and Frank Benko agrees to purchase at the price of Eighteen Thousand Dollars, the following described real estate, situated in Cook County, Illinois.

(Here is given description of the property.)

“Said purchaser, Frank Benko, has paid Two Hundred (\$200.00) Dollars as earnest money, to be applied on said purchase when consummated, and agrees to pay the sum of Seventeen Thousand Eight Hundred (\$17,800.00) Dollars, sixty days after the date hereof, provided that the said Kate Lenard at that time delivers to him a good and sufficient Warranty Deed with release of dower, conveying to said purchaser a good title to said premises, and upon the further condition that the abstract of title to said premises shows a good title.

“A complete Abstract of Title or merchantable copy to be furnished within a reasonable time, with a continuation thereof brought down to this date. In case the title upon examination is found materially defective within ten days after said Abstract is furnished, then unless the material defects be cured within a reasonable time after written notice thereof, the said earnest money should be refunded to the said Frank Benko, and in addition to said earnest money the said Kate Lenard shall pay to him, the amount of his expenditures and loss that he has sustained by reason of this contract.

“Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, including commissions payable by vendor, and this contract shall be and become null and void.

Benko v. Lenard, 191 Ill. App. 600.

Time is of the essence of this contract, and of all the conditions thereof.

"IN TESTIMONY WHEREOF, said parties here-to set their hands this 8th day of June, A. D. 1912.

Kate Lenard,
Frank Benko."

The evidence showed that defendant brought the abstract to the attorney in whose office the contract was drawn and that it remained there until after the expiration of the sixty-day period. After the period expired, defendant tendered a warranty deed to plaintiff who declined to receive it and demanded the return of the earnest money.

Judgment for plaintiff for two hundred dollars was rendered and to reverse this judgment, defendant sues out this writ of error.

BURRES & ST. GEORGE, for plaintiff in error; MAXIMILIAN J. ST. GEORGE, of counsel.

THOMAS J. PEDEN and ROY C. MERRICK, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to establish relation.* Evidence examined in action to recover earnest money paid upon a contract for the purchase and sale of real estate and held to warrant a finding that the attorney drafting the contract was acting as defendant's agent.

2. VENDOR AND PURCHASER, § 121*—*when delivery to vendor's agent not delivery to purchaser.* Delivery of an abstract of title by the vendor of the land to such vendor's agent does not constitute a delivery to the purchaser.

3. VENDOR AND PURCHASER, § 121*—*when tender of warranty deed does not cure default in giving abstract of title.* Where a contract for the purchase and sale of realty provides that an ab-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Eppstein v. M. & M. Hotel Co., 191 Ill. App. 603.

abstract of title shall be delivered to the purchaser in a reasonable time and that it shall show a good title and that the vendor shall deliver a warranty deed sixty days after the date of the contract, a tender of the deed after the expiration of the sixty-day period and while the vendor is in default as to the abstract is insufficient where the purchaser demanded a return of the earnest money and showed his intention to rescind.

**Elmer S. Eppstein, Defendant in Error, v. M. & M.
Hotel Company, Plaintiff in Error.**

Gen. No. 20,628. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by Elmer S. Eppstein, plaintiff, against M. & M. Hotel Company, a corporation, defendant, to recover judgment for clothes and a handbag alleged to have been stolen from plaintiff's room in defendant's hotel.

Defendant's contention was that plaintiff was a permanent lodger and not a transient guest and that therefore it was not to be held to the liability of an innkeeper but that its relation was merely that of lodging house keeper.

On the submission to the jury of a special interrogatory embodying this issue, it found that plaintiff was not a permanent lodger and judgment was rendered for plaintiff. To reverse this judgment, defendant prosecutes this writ of error.

Derby v. Gudichsen et al., 191 Ill. App. 604.

JOSEPH D. IROSE, for plaintiff in error.

AARON B. EPPSTEIN, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **INNKEEPERS, § 3***—*when evidence sufficient to show guest not permanent lodger.* Evidence examined and held sufficient to warrant finding that plaintiff was a transient guest and not a permanent lodger.

2. **MUNICIPAL COURT OF CHICAGO, § 26***—*when exclusion of statement not error.* In an action in the Municipal Court of Chicago it is not error to exclude as evidence an amended statement of claim not signed by plaintiff and subsequently withdrawn.

Frank N. Derby, Defendant in Error, v. Herman Gudichsen and Matilda P. Gudichsen, Plaintiffs in Error.

Gen. No. 20,646.

BROKERS, § 90*—*when evidence sufficient to show performance of contract.* In an action by a real estate broker to recover commissions for services in negotiating a contract for the exchange of defendants' real estate where the evidence shows that the other party to the contract owned the property which he offered in exchange, though he had the title taken in the name of another when he purchased it, it is sufficient to show that plaintiff had procured the execution of a valid and enforceable contract and to support a recovery of the commissions provided for in the contract.

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

CHYTRAUS, HEALY & FROST and EDWIN WHITE MOORE,
for plaintiffs in error.

ARTHUR A. BASSE, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE MCSURELY delivered the opinion of the court.

This is a suit for commissions under a contract made between the defendants and Edward J. Novak providing for the exchange of real estate. Upon trial plaintiff had judgment for two hundred dollars, which is the amount provided for by the contract to be paid by the defendants. The property which Novak agreed to give in exchange for defendants' property was a farm in the county of Marinette and State of Wisconsin. That the services in the negotiation of the contract were rendered by plaintiff is not disputed, but the point defendants made upon the trial and now present to this court as a basis for a reversal is that the plaintiff is required to prove that Novak "had a good and sufficient title" to the farm, and that no proof of such fact was offered.

It is urged by the defendants that the law is that a real estate broker suing for commissions for procuring an exchange of pieces of real estate must prove that the opposite party has a good and sufficient title to the lands agreed by him to be conveyed, and in case of failure to make such proof no recovery can be had. Whether or not this is the law we do not feel called upon to determine, for the reason that in our opinion the evidence sufficiently shows that Novak had the right to sign the contract in question and that the defendants could, if they had seen fit, have enforced its performance by him. It is not denied that Novak, as he testified, owned the Wisconsin farm, and when he bought it he had the title taken in the name of "James J——." These facts bring the case exactly within the decision in the case of *Kuhn v. Eppstein*, 219 Ill. 154, where it was held that the person holding the title held it merely as an agent of the owner and subject to his order, the court in its opinion saying: "The contract was signed by the real equitable owner of the premises. It cannot be disputed that he had full power and authority to make the contract of sale, or to make any

Aetna Life Ins. Co. v. Wadeford Electric Co., 191 Ill. App. 606.

other disposition of his own property as he might see fit * * * we see no reason why the contract was not mutual and could not be enforced by either of the parties thereto, one against the other." We think this opinion is decisive of the point before us. It follows therefore that the plaintiff, having been the means of procuring the execution of a valid and enforceable contract between the parties was entitled to the commission as therein provided.

We do not think there is any merit in the point that Harold J. Derby, an alleged copartner of the plaintiff, should also have been made a plaintiff. An examination of the record does not sustain the contention of the defendants that there is a copartnership consisting of Frank N. Derby and Harold J. Derby.

We see no reason to disturb the finding and judgment, and the judgment is affirmed.

Affirmed.

**Aetna Life Insurance Company, Defendant in Error,
v. Wadeford Electric Company, Plaintiff in Error.**

Gen. No. 20,693. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed March 8, 1915.

Statement of the Case.

Action by Aetna Life Insurance Company, plaintiff, against Wadeford Electric Company, a corporation, defendant, to recover premiums alleged to be due under certain policies of liability insurance issued at the special instance and request of defendant.

Defendant's affidavit of defense was struck from the files, as was also its amended affidavit of defense. No propositions of law were submitted.

To reverse judgment for plaintiff for \$82.22 entered on his affidavit of claim, defendant prosecutes this writ of error.

DANIEL M. MICKEY, for plaintiff in error.

FREDERICK K. WARNE, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 27*—*when motions and orders not reviewable.* Motions and orders striking affidavits of defense from the files cannot be reviewed on a writ of error unless they are preserved by a bill of exceptions.

2. MUNICIPAL COURT OF CHICAGO, § 26*—*when matters not preserved in record not reviewable.* On a writ of error to reverse a judgment in an action to recover premiums alleged to be due under insurance policies, where the policies are not preserved in the record, the court cannot consider their provisions.

**The Lord & Bushnell Company, Defendant in Error,
v. W. J. Campbell, trading as W. J. Campbell Lum-
ber Company, Plaintiff in Error.**

Gen. No. 20,726. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment here. Opinion filed March 8, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Lord & Bushnell Co. v. Campbell, 191 Ill. App. 607.

Statement of the Case.

Action by The Lord & Bushnell Company, a corporation, plaintiff, against W. J. Campbell, trading as W. J. Campbell Lumber Company, defendant, to recover an unpaid balance claimed to be due for the purchase of certain lumber sold to defendant. The sale and delivery of the lumber at the price alleged was admitted by defendant, but he claimed to have had a contract with plaintiff for further lumber at the same price and that this contract was violated by plaintiff's refusal to deliver the balance of the lumber, to the damage of defendant.

The agreement between the parties was created through letters between them which were introduced in evidence.

Plaintiff's statement of claim also included an item for an allowance on lumber bought of defendant but rejected by plaintiff and an agreement by defendant to make such allowance was established.

To reverse a judgment for plaintiff for \$359.19, defendant prosecutes this writ of error.

MORSE IVES, for plaintiff in error.

LOUIS J. BEHAN, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. SET-OFF AND RECOUPMENT, § 40*—*when evidence insufficient to establish.* Evidence examined and held insufficient to establish contract whereon claim of set-off based.

2. CONTRACTS, § 372*—*when existence not affected by destruction of writing evidencing it.* The fact that the original writing evidencing the terms of an agreement entered into between the parties, which was signed and delivered, is destroyed does not destroy the agreement, but the terms of the agreement may be shown by introducing a copy.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Augustus D. Juilliard et al., Defendants in Error, v.
Jacob Friedman, Plaintiff in Error.****Gen. No. 20,147. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed March 11, 1915.

Statement of the Case.

Action by Augustus D. Juilliard and others against Jacob Friedman to recover for the contract price of silk alleged to have been sold and delivered to defendant, and which defendant denied having ordered. Judgment in a prior trial was reversed in 174 Ill. App. 259. Upon the second trial plaintiff again recovered judgment, from which defendant brings error.

JULIUS HELDMAN and SIMON LA GROU, for plaintiff in error.

EDWARD J. QUEENY and WILLIAM J. LACEY, for defendants in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 344*—*what is measure of damages where purchaser refuses to accept goods.* Where the purchaser of goods refuses to accept the same and the goods are permanently retained by the seller or resold by him, in an action against the purchaser the measure of damages is not the full contract price, but the excess, if any, of the contract price over the market price of the goods at the time and place of the delivery to the defendant.

2. EVIDENCE, § 58*—*when evidence of private custom inadmissible.* In an action by the sellers of goods against the purchaser who refused to accept same, claiming that he had never ordered the goods, evidence of a private custom of plaintiffs unknown to defendant, as to their method of sending out bills for goods sold, held erroneously admitted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

De Tarnowsky v. Walker, 191 Ill. App. 610.

**George de Tarnowsky, Defendant in Error, v. Charles
H. Walker, Plaintiff in Error.**

Gen. No. 20,164. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed March 11, 1915.

Statement of the Case.

Action by George de Tarnowsky against Charles H. Walker to recover for medical services rendered defendant's minor son who was injured by a freight car, his leg having been crushed from the ankle nearly to the knee. Plaintiff had apparently been called by a witness to the accident. On the second day after the accident defendant, with plaintiff's consent, called his family physician, Dr. McClintock, to see the boy. Plaintiff testified that his condition on that day was very bad, that "it looked as though he might pass away that day," and in order to tide him over the crisis he injected a saline solution. His condition immediately improved and on the following day the boy was removed to another hospital and plaintiff's connection with the case terminated.

Defendant endeavored to show by Dr. McClintock that plaintiff admitted that he had exhausted his medical knowledge and that the saline solution had been injected at the suggestion of the witness; but the proffered evidence was excluded. In the course of the examination of Dr. McClintock the following occurred in the presence of the jury:

"Mr. Bishop. Who, if anyone at that time suggested to you—

A. I did.

Q. —the application or use of this saline solution?
Mr. Holton: I object.

The Court (to the witness): Leave the witness stand. You knew that question was to be objected to and you deliberately answered it, as you have several times before,—*aching here all this time to get in that answer to that question.*”

Thereupon, the witness left the witness stand, and the Court said to defendant's counsel: “Proceed with some other witness and *get a witness who is willing to be fair.*” Counsel replied that he had no other witness, but would make an offer of proof out of the hearing of the jury. An argument ensued between the court and counsel in the presence of the jury, in the course of which the Court used the following language: “This witness, after deliberately warning him two or three times,—he deliberately tried to inject his answer in before counsel got in his objection—he did it designedly, with a purpose, and when this is done—done repeatedly—the witness is no longer entitled to sit on a witness stand and be heard. * * * This witness seems overly anxious. It is not proper that one member of the profession should be overly anxious to punish another member of a profession even though parties may differ. But when a witness of that kind takes deliberate opportunity to deliberately defeat some other member of the profession, it seems to me going entirely outside the bounds. * * * He is one of those very smart young doctors that want to show he knows it all and no other physician knows what he is acting on. He thought that he would show us, in spite of court and in spite of counsel and everybody and anybody else, he was going to show how smart he was. He will find out that courts of justice are not constituted for such purposes as that.”

The defendant offering no further testimony the court directed a verdict for plaintiff, from a judgment on which defendant brings error.

P. H. BISHOP, for plaintiff in error.

HELMER, MOULTON, WHITMAN & WHITMAN, for defendant in error; CHARLES R. HOLTON, of counsel.

De Tarnowsky v. Walker, 191 Ill. App. 610.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. **PHYSICIANS AND SURGEONS, § 28***—*what evidence competent in action for services.* Where in an action by a physician against a father for medical services rendered to his minor child, injured in an accident, the plaintiff testified that the condition of the child indicated a rapidly approaching fatal termination when he injected a saline solution into the veins, causing an immediate improvement, refusal to permit defendant's family physician, called into consultation with plaintiff at defendant's request, to testify that the saline injection was made at his suggestion, plaintiff having admitted to him that he had reached the end of his medical resources, was erroneous, since it would have a tendency to prove failure on plaintiff's part to use due care in his treatment.

2. **TRIAL, § 71***—*when court without power to direct witness to leave stand.* While the trial court has full power to punish a witness for wilful disobedience of its warning not to answer questions in advance of objection, it was without power to exclude his competent evidence or deprive a party of the benefit of his testimony by compelling him to leave the witness stand, on account of an alleged violation of such a warning.

3. **TRIAL, § 45***—*when remarks of trial court prejudicial.* Remarks of a trial judge on peremptorily ordering a witness to leave the stand because of giving answers to questions in advance of objection, which were of such a character as to discredit the witness and his testimony, *held* prejudicial.

4. **PHYSICIANS AND SURGEONS, § 28***—*what constitutes question of fact as to value of services.* In an action by a physician to recover for medical services to defendant's minor child, who was injured in an accident, testimony of defendant's family physician, who was called into consultation with plaintiff at defendant's request, that the child's condition indicated that death was imminent, that plaintiff admitted having reached the end of his medical resources whereupon he suggested to plaintiff the injection of a saline solution, after which the child's condition immediately improved, that if such injection had been made earlier it would not have been necessary to remove as much of the child's leg as was afterwards amputated, has a tendency to raise an issue of fact as to whether plaintiff's services were of any value.

5. **PHYSICIANS AND SURGEONS, § 24***—*what constitutes a defense in action for services.* In an action by a physician to recover for medical services rendered defendant's minor child, proof that plaintiff's services were of no value constitutes a defense.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Central Trust Company of Illinois, Defendant in
Error, v. Smurr & Kamen Machine Company,
Plaintiff in Error.**

Gen. No. 20,178.

1. CORPORATIONS, § 457*—*when liable on accommodation note.* A manufacturing corporation executing and delivering a promissory note to another corporation solely for the accommodation of the latter, who indorsed and sold it to an innocent purchaser for value before maturity and without notice that it was accommodation paper, is liable thereon at the suit of the bona fide holder.

2. BILLS AND NOTES, § 240*—*when purchase of accommodation paper bona fide purchaser.* One purchasing accommodation paper of a business corporation in good faith, before maturity, without notice of its character as accommodation paper and paying therefor the full face value of the paper, less six per cent. discount, is a bona fide purchaser for value.

PAM, J., took no part in the decision of this case.

Error to the Municipal Court of Chicago; the Hon. FRED C. HILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed March 11, 1915.

ALBERT O. OLSON, for plaintiff in error; JAMES J. LEAHY, of counsel.

PAM & HURD, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

The question presented in this case is whether the promissory note of an Illinois manufacturing corporation, which is executed and delivered to another corporation solely for the accommodation of the latter, and which is indorsed and sold to a third party, who buys in good faith before maturity and without notice that it was accommodation paper, can be enforced as against the maker.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Central Trust Co. v. Smurr & Kamen Machine Co., 191 Ill. App. 613.

Plaintiff in error (hereinafter called the defendant), an Illinois corporation engaged in the manufacture and sale of vehicles, machinery and tools, on July 28, 1913, executed and delivered its promissory note of that date for \$675, due one hundred days after date with interest at six per cent., payable to the order of the Illinois Spring and Wire Company. Shortly after receiving it, the payee indorsed the note in blank, and sold it to defendant in error, a banking corporation (hereinafter called the plaintiff), who paid to the payee the face value of the same, less six per cent. discount. The bank had no information about the paper except what appeared on its face, and made no inquiry concerning the same, further than to look up the rating of the maker in the commercial agency reports. The payee was a depositor in the plaintiff's bank and had discounted other promissory notes in a similar manner prior to this occurrence. The note not being paid at maturity, the bank brought suit upon the same against the maker in the Municipal Court. Upon the trial, the defendant attempted and offered to prove that it had received no consideration or benefit of any kind for the note, and that it was given to the payee purely as an accommodation for the purpose of enabling the latter to raise money with which to meet and pay its (the payee's) obligations. The court sustained objections to the offered proof and, no other defense being interposed, entered a finding in favor of the bank for the full amount of the note and interest. This writ of error was sued out to reverse the judgment entered upon that finding.

The argument of counsel for the defendant proceeds upon the theory that the execution and delivery of the note in question was an *ultra vires* act on the part of the defendant corporation, and it is insisted that for this reason the note was and is absolutely void, even in the hands of a bona fide purchaser for value before maturity, without notice of the fact that it was accommodation paper.

In support of this contention, a number of Illinois cases are cited upon the general doctrine of *ultra vires*. All of these cases, however, are essentially different from this case, on the facts, and none of them presents exactly the same questions of law that are involved in this case. Most of the cases cited follow the principles first announced in the well-known case of *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, to which they nearly all refer. The contract sought to be enforced in that case consisted of a clause in a deed of certain real estate to a building and loan association, whereby it was agreed that the association should assume and pay an existing incumbrance upon the same, and the court held not only that the assumption of such an indebtedness was beyond the statutory powers of the corporation, but that every person dealing with such a corporation is charged with notice of its powers and limitations and cannot plead ignorance in avoidance of the defense of *ultra vires*. The invalidity of the contract there in question was established when it appeared, by a mere examination of the statute, that the corporation had no power to make such a contract under any circumstances. In the opinion filed in that case, however, the following language is quoted with approval, from the case of *Davis v. Old Colony R. Co.*, 131 Mass. 258: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Co.*, 23 How. 381, 398, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, 101 Mass. 57, 58 and by Lord Chancellor Cairns and Lord Hatherly in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance,

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when such abuse or failure is not known to the other contracting party." (Italics ours.)

The opinion of Mr. Justice Hoar, thus referred to (*Monument Nat. Bank v. Globe Works*, 101 Mass. 57), unequivocally holds that the note of a manufacturing corporation in the hands of a holder in good faith for value, who took it before maturity and without knowledge that the maker had not received full consideration, can be enforced against the corporation, although it was made as an accommodation note. Starting with the proposition, as a settled rule of the law, that a manufacturing corporation has the general power to make a negotiable promissory note, the court holds that if the only defense to such a note is that this general power has been abused in the particular instance, "*the abuse not being known to the other contracting party*," then "the doctrine of *ultra vires* does not apply." In support of this conclusion, Mr. Justice Hoar quotes the following from *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 289: "There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. * * * Where the want of power is apparent, upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which

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*the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would * * * be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.*" (Italics ours.)

In *National Bank of Republic v. Young*, 41 N. J. Eq. 531, the same distinction is expressed as follows: "The general doctrine of the law is that where a corporation has power under any circumstances to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." (Citing authorities.) "This doctrine is applied to commercial paper made by a corporation for the accommodation of a third person when in the hands of a *bona fide* holder, who has discounted it before maturity on the faith of its being business paper." The same principle is recognized in the following cases: *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573; *Madison & I. R. Co. v. Norwich Sav. Society*, 24 Ind. 457; *Lehigh Valley Coal Co. v. West Depere Agricultural Works*, 63 Wis. 45; *Auerbach v. Lesueur Mill Co.*, 28 Minn. 291.

These cases, we think, fairly reflect the general current of authority upon this question; and in view of the language quoted above from the opinion in *National Home Building & Loan Ass'n v. Home Sav. Bank*, *supra*, it cannot be held that the Supreme Court of this State intended to announce a different rule as applicable to cases of this character. If the contention of defendant's counsel were to prevail, it would charge every *bona fide* purchaser of the commercial paper of business corporations with the duty of ascertaining, at his peril, before purchasing the same, all the facts with reference to the consideration for which

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such paper was issued. No case has been cited, and we know of none, in which such a rule has been announced with reference to ordinary business corporations, having the general power to issue negotiable paper. Doubtless all purchasers of commercial paper are chargeable with notice of such facts as appear upon the face of the paper offered for sale by a business corporation and of all limitations imposed by statute upon the powers of such corporations. But to carry this principle to the length contended for in this case would make it extremely hazardous for any bank to use the paper of such corporations in any business transaction.

It is also contended that the plaintiff was not a bona fide holder for value. This contention is based upon a statement in the brief of counsel that the bank credited the account of the payee at the bank with the proceeds of the note by way of deposit, and that there is no evidence that such deposit had been withdrawn. As we read the record, there is no evidence that the bank credited the account of the payee in the manner stated. On the contrary, the undisputed testimony is that the bank paid full face value for the note, less six per cent. discount. There is no merit in the contention.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

Affirmed.

MR. JUSTICE PAM took no part in the decision of this case.

Marshall Field & Company, Plaintiff in Error, v. Isidor B. Freed, Defendant in Error.

Gen. No. 20,190.

1. WORDS AND PHRASES,—word “or” defined. The word “or” imports a choice between two alternatives, and, as ordinarily used, means one or the other of two, but not both.

2. EXECUTION, § 282*—*issuance against body and property at common law*. At common law an execution against the property of a defendant and against his body could lawfully be issued simultaneously.

3. EXECUTION, § 282*—*right to simultaneous executions against body and property under statute*. Under R. S. ch. 77, sec. 4 (J. & A. § 6750) providing that the person in whose favor any judgment may be obtained “may have execution thereon in the usual form, directed to the proper officer of any county, in this state, against the lands and tenements, goods and chattels of the person against whom the same is obtained, or against his body, when the same is authorized by law,” a judgment creditor is entitled to have either writ, at his option, but not both at the same time, since to give the disjunctive “or” in the statute the effect of the conjunction “and” would, in effect, merely render the section declaratory of the common law.

4. EXECUTION, § 36*—*choice of remedies*. There is no inconsistency between the remedy by *capias ad satisfaciendum* and that by execution against the property.

5. EXECUTION,—*when capias ad satisfaciendum not barred by resort to fieri facias*. A judgment creditor electing in the first instance to sue out a *feri facias* is not thereby precluded from subsequently securing a writ of *capias ad satisfaciendum*, upon the return of the *feri facias nulla bona*, such election not being final in the absence of satisfaction.

6. EXECUTION, § 308*—*when imprisonment on ca. sa. regarded as satisfaction of judgment*. Where a judgment creditor in a tort action sues out a *capias ad satisfaciendum* in the first instance, and the defendant is arrested and imprisoned upon such writ, his arrest and imprisonment are regarded *prima facie* as a satisfaction of the judgment.

7. EXECUTION,—*effect of imprisonment on ca. sa. as suspending remedies*. While imprisonment continues upon a writ of *capias ad satisfaciendum*, it operates as a suspension of all other remedies on the judgment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Marshall Field & Co. v. Freed, 191 Ill. App. 619.

8. EXECUTION, § 306*—*what is effect of termination of imprisonment on ca. sa.* Where imprisonment under a writ of *capias ad satisfaciendum* is terminated without the consent of the creditor, the judgment remains unsatisfied, except in so far as the imprisonment is a credit upon it, under the statute, at the rate of \$1.50 per day.

9. EXECUTION, § 306*—*what is effect of discharge from imprisonment under Insolvent Debtors' Act.* Where a judgment debtor imprisoned under a *capias ad satisfaciendum* is discharged under the provisions of the Insolvent Debtors' Act (R. S. ch. 72, sec. 33, J. & A. ¶ 6230), such discharge does not constitute a satisfaction of the judgment, and the same may be enforced by execution against the property.

10. EXECUTION, § 306*—*what is effect of discharge from arrest for nonpayment of board.* Where a judgment debtor imprisoned under a *capias ad satisfaciendum* is discharged because of failure of the arresting creditor to advance and pay the jail fees for board, etc., such discharge removes the presumption of satisfaction arising from the arrest and imprisonment of the debtor, and the creditor may thereafter proceed by execution against the property.

11. EXECUTION,—*what is effect of election to proceed against property or body.* The only practical consequence of an election to sue out a writ directed against the property of a judgment debtor, or one directed against his body, is to suspend his right to sue out another writ until the first has been returned unsatisfied in whole or in part.

12. EXECUTION, § 286*—*procedure to secure ca. sa.* Even though R. S. ch. 77, secs. 4, 5 (J. & A. ¶¶ 6750, 6751) should be construed as permitting the issuance of a writ of *capias ad satisfaciendum* in tort actions, in the first instance, merely on motion of the judgment creditor and without any preliminary affidavit, it would not render that practice proper where the writ is sought as a second or alternative writ after an execution against the property has been returned unsatisfied the practice in the latter case being governed by section 62 (J. & A. ¶ 6809).

13. EXECUTION,—*how statute as to body executions construed.* The statute permitting the issuance of executions against the body is penal in character and must be strictly construed.

14. EXECUTION,—*what essential to issuance of ca. sa. after execution against the property.* Under R. S. ch. 77, sec. 62 (J. & A. ¶ 6809), no execution against the body can be issued in any action, whether in tort or in contract, after the return of an execution against the property unsatisfied in whole or in part, except upon a compliance with the terms of that section.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed March 11, 1915. Rehearing denied March 24, 1915.

FRANK P. LEFFINGWELL, for plaintiff in error.

BERNARD J. BROWN, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

The plaintiff, Marshall Field & Company, recovered a judgment in the Superior Court against the defendant, Isidor B. Freed, in an action on the case for fraud and deceit. Due service of process was had on the defendant and he entered his appearance, but filed no plea. A default was thereupon entered for want of a plea, and the damages were assessed by a jury. A writ of *feri facias* was issued and placed in the hands of the sheriff. In due course, the sheriff returned this writ "no property found and no part satisfied," certifying in his return that he had made a demand upon the defendant for the surrender of property to satisfy the writ, and had informed him that if he failed to comply with such demand he would be liable to arrest upon an execution against his body. Several months later, apparently as a matter of course and without any preliminary affidavit being filed, an order was entered directing the issuance of a *capias ad satisfaciendum*, and under this writ the sheriff arrested the defendant and committed him to jail on October 2, 1913. The next day, on motion of the defendant, an order was entered quashing the *capias*, and the defendant was released from custody. On October 4, 1913, the plaintiff made a motion to vacate the order quashing the writ, and on October 27, 1913, this motion was heard and overruled. Exceptions were duly preserved to each of these rulings, and this writ of error is prosecuted to review the same.

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Section 4 of chapter 77, R. S. (J. & A. ¶ 6750), provides that the person in whose favor any judgment may be obtained "may have execution thereon in the usual form, directed to the proper officer of any county, in this state, against the lands and tenements, goods and chattels of the person against whom the same is obtained, *or* against his body, when the same is authorized by law." Section 5 (J. & A. ¶ 6751) of the same chapter provides that "no execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum (respondendum)* as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors." Section 62 (J. & A. ¶ 6809) of the same chapter provides, in substance, that if upon the return of an execution unsatisfied, in whole or in part, the judgment creditor, or his agent or attorney, shall make an affidavit to the effect that he believes the debtor has property which he unjustly refuses to surrender, or that since the debt was contracted the debtor has fraudulently disposed of some part of his property to defraud his creditors, and shall procure the order of some judge or master in chancery certifying that the affidavit shows probable cause for the issuance of an execution against the body of the debtor, then such a writ may be issued.

Counsel seem to agree that all the questions here presented depend upon the proper construction to be given to the word "*or*," as used in section 4, *supra*. Plaintiff's counsel contends in substance, that the word "*or*," as used in that section, does not require the judgment creditor in a tort action to *elect* whether he will have an execution against the property of the debtor, *or* one against his body, but that he may have either or both, at any time until satisfaction is obtained. If this contention be sound, the word "*and*," rather than the word "*or*," should properly have been

used in the section in question, and this, in effect, is the position of plaintiff's counsel. Defendant's counsel, on the other hand, insists that the word "or" was advisedly and not carelessly used, and requires the creditor to elect which of the two writs he will have, and that such election when made is final, precluding any subsequent resort to the other kind of execution.

In support of defendant's contention, his counsel cites the case of *Schwarzschild & Sulzberger v. Goldstein*, 121 Ill. App. 1. The decision in that case turned upon the construction of section 3 of article 11 of the Act in relation to justices of the peace (R. S. ch. 79, J. & A. ¶ 6981), which reads as follows: "Upon all judgments in actions in tort, or where the defendant is in custody or has been held to bail upon a *capias*, as provided in this act, the justice may issue an execution against the body *or* goods and chattels of the defendant, *at the election of the plaintiff*." The court held—Mr. Justice Adams delivering the opinion of the court—that the words "at the election of the plaintiff," in connection with the word "or," as found in the section of the statute then under consideration, could only be given effect by requiring the plaintiff to a judgment in a justice's court to choose whether he will have an execution against the body of the defendant, or an execution against his property, and that such choice, when made, is followed by the usual consequences attendant upon an election between *inconsistent* remedies. It appears that in that case an execution against the property of the debtor had been issued and returned before the *capias* was issued, and the court held upon the principle above stated, that the issuance of the first writ constituted an election within the meaning of the statute, and that the consequence of such election was that the *capias* subsequently issued was unauthorized.

It will be noted that the clause "at the election of the plaintiff," which is contained in the section of the Justices' Act that was under consideration in the case

cited, is not found in section 4 of chapter 77, or elsewhere in that chapter, which relates to judgments and executions in courts of record. Nevertheless, the word "or," even without that clause, imports a choice between two alternatives. As ordinarily used, it means "one or the other of two, but not both." 29 Cyc. 1502; *Kuehner v. City of Freeport*, 143 Ill. 92, 100. At common law an execution against the property of a defendant and against his body could lawfully be issued simultaneously. The fact that either writ had been issued and was in the hands of the sheriff unexecuted did not, at common law, preclude the right to the issuance of the other. 17 Cyc. 1504. The judgment creditor had the right to both writs at the same time, though he could have but one satisfaction. If, therefore, the Legislature had used the word "and" in section 4 instead of the word "or," that section would have been merely declaratory of the common law in this respect. This suggests at once that the word "or" in that section was advisedly and intentionally used, and indicates an intention on the part of the Legislature to change the common-law rule by giving to the judgment creditor in a court of record the right to have either writ at his option, but not both *at the same time*. We are clearly of the opinion that this is the sense in which it is used in section 4.

In this case, the writs were not both issued at the same time. The *capias* was not issued until after the *feri facias* had been returned *nulla bona*. The first question to be determined, therefore, is whether the plaintiff, by electing in the first instance to sue out a *feri facias* upon his judgment, was precluded from afterwards having a *capias ad satisfaciendum* upon the return of the first writ unsatisfied. There is no inconsistency in these remedies. The purpose of each is to obtain satisfaction of the judgment. If the plaintiff in a judgment in tort sues out a *capias ad satisfaciendum* in the first instance, and the defendant is

arrested and imprisoned upon such a writ, his arrest and imprisonment are regarded prima facie as a satisfaction of the judgment. 17 Cyc. 1504. While such imprisonment continues, it operates as a suspension of all other remedies on the judgment. But if the imprisonment is terminated without the consent of the creditor, the judgment still remains unsatisfied, except so far as the imprisonment is a credit upon it, under the statute, at the rate of \$1.50 per day. *Wiltshire v. Lambert*, 44 Ill. App. 473. Or if, in such case, the debtor be discharged under the provisions of the Insolvent Debtors' Act, then, by the express terms of that Act (sec. 33, ch. 72, J. & A. ¶ 6230), such discharge does not constitute a satisfaction of the judgment, and the same may be enforced by an execution against the property of the debtor, notwithstanding the prior issuance of the *capias ad satisfaciendum*. Or if, in such case, the debtor be discharged from arrest because of the failure of the arresting creditor to advance and pay the jail fees for board, etc., such discharge removes the presumption of satisfaction arising from the arrest and imprisonment of the debtor, and the creditor may thereafter proceed by execution against the property of the debtor, notwithstanding the fact that an execution against the body was previously issued. *Lambert v. Wiltshire*, 144 Ill. 517. It therefore appears that if the creditor elects, at the first time he is called upon to make such an election, to sue out an execution against the body of the debtor, such election is not final unless satisfaction is obtained. On the other hand, if a judgment creditor, instead of suing out a *capias ad satisfaciendum* in the first instance, elects to sue out an execution against the property of the debtor, and such writ proves unavailing and is returned "no property found and no part satisfied," after proper demand, then the creditor may unquestionably have successive writs of the same kind until full satisfaction has been obtained, or, if the facts warrant it, he may have a *capias ad satisfaciendum*, notwithstanding the issuance of the first writ, by

complying with the provisions of section 62 of chapter 77, above quoted.

In all of the cases above mentioned, the practical consequences of an election on the part of a judgment creditor to sue out either form of writ in the first instance have been thus fully and clearly provided for by statute. In none of such cases, therefore, is there any occasion or any room for the application of the doctrine of election between inconsistent remedies. In all of such cases, while it is clear that the Legislature did not intend that a judgment creditor may have both writs at the same time, it is quite as clear that the only practical consequence of an election on his part to take out either form of writ is to suspend his right to sue out another writ until the first has been returned unsatisfied, in whole or in part.

The question then naturally arises, has a judgment creditor in a tort case the right, after the return of a first execution unsatisfied, in whole or in part, to sue out a *capias ad satisfaciendum* without taking the preliminary steps prescribed by section 62 of chapter 77. Section 4 of that chapter states that the plaintiff may have an execution against the body only "when the same is authorized by law." Section 5 forbids the issuance of such an execution except in three enumerated cases, one of which is "when the judgment shall have been obtained for a tort committed by such defendant." The only authority for the issuance of a *capias ad satisfaciendum* in the first instance is found in these two sections, and neither of those sections states how or in what manner such a writ may be obtained. It is commonly understood that an execution against the body may be issued, in any tort action, on mere motion of the judgment creditor, without any preliminary affidavit, and there is judicial authority for this view of the matter. *Nelson v. Swanson*, 186 Ill. App. 632. Conceding that sections 4 and 5 may properly be construed as authority for that practice in cases where the judgment creditor elects to sue out a *capias ad satisfaciendum* in the first instance, it does

not follow, however, that a judgment creditor may have such a writ as a second or alternative writ after an execution against property has been issued and returned unsatisfied in whole or in part. Section 62 explicitly prescribes the procedure that shall be followed whenever a judgment creditor desires to have a *capias ad satisfaciendum* issued "upon the return of an execution unsatisfied, in whole or in part." That section makes no distinction between executions issued upon judgments in tort and those issued upon judgments in actions *ex contractu*. By its express terms, it applies to all cases in which an execution has been issued and returned "unsatisfied in whole or in part," after a proper demand has been made upon the debtor for the surrender of property to satisfy the execution. The statute permitting the issuance of executions against the body is penal in its nature, and must be strictly construed. When thus construed, we think it must be held that the Legislature intended to provide by section 62 that no execution against the body should be issued in any case after the return of a property execution unsatisfied in whole or in part, except upon a compliance with the provisions of that section. It follows that although the issuance of the first writ in this case did not constitute a technical "election," in the sense in which that word is used when applied to an election between inconsistent remedies, still the *capias* issued in this case was not "authorized by law" because it was issued after the return of an execution unsatisfied, without following the procedure prescribed by section 62.

We conclude, therefore, that the Superior Court did not err in quashing the *capias* on motion of the defendant, nor in denying the motion to vacate the order quashing the writ, for the reasons above stated, and the action of the Superior Court will consequently be affirmed.

Affirmed.

McDonald v. Lehigh Valley R. Co., 191 Ill. App. 628.

**Eugene F. McDonald, Jr., Defendant in Error, v.
Lehigh Valley Railroad Company, Plaintiff in Error.**

Gen. No. 20,241. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed March 11, 1915. Rehearing denied March 24, 1915.

Statement of the Case.

Action by Eugene F. McDonald, Jr., plaintiff, against Lehigh Valley Railroad Company defendant, for damages alleged to have been sustained by the failure of defendant to safely carry the plaintiff's automobile from Truxton, New York to Chicago, Illinois.

For the plaintiff were introduced in evidence a freight bill of the Michigan Central Railroad Co., issued at Chicago, and a bill of lading, alleged to have been issued by defendant, which recited the receipt of the automobile at Truxton, N. Y., in apparent good order. The bill of lading was received in evidence over defendant's objection. Plaintiff and other witnesses testified to the condition of the car and its value when it was received in Chicago.

No evidence was introduced for defendant.

To reverse a judgment for plaintiff for five hundred dollars, defendant prosecutes this writ of error.

HOAG & ULLMANN, for plaintiff in error.

SABATH, STAFFORD & SABATH, for defendant in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Women's Catholic Order of Foresters v. Hill et al., 191 Ill. App. 629.

Abstract of the Decision.

1. CARRIERS, § 45*—*when admission of bill of lading without proof of execution error.* In an action against an initial carrier to recover for damages alleged to have been caused goods in shipment, it is error to admit in evidence, over defendant's objection, a printed form of a bill of lading purporting to be signed by defendant's agent where there is no proof that the signature is that of the alleged agent nor that he was, in fact defendant's agent.

2. CARRIERS, § 128*—*when evidence insufficient to show condition of freight when received.* In an action against an initial carrier to recover for damages alleged to have been caused an automobile in transporting it, where the defendant denies negligence, the damage is not shown by the introduction of an alleged bill of lading of defendant, the execution of which is not proven and the admission of which is objected to, reciting the receipt of the automobile "in apparent good order," where it appears that it had been in use for some time and there is nothing to show that it was not in the same condition when shipped as when delivered at its destination.

3. CARRIERS, § 128*—*what not admission as to condition of freight when received.* In an action against a carrier for injury to freight, the admission by defendant's counsel of the receipt of the freight by defendant is not an admission that the freight was in good order when received.

4. EVIDENCE, § 4*—*when judicial notice not taken of Municipal Court rule.* The Appellate Court cannot take judicial notice of a rule of the Municipal Court of Chicago which is not in the record.

**Women's Catholic Order of Foresters, Appellee, v.
Mary Hill and Jennie Oetzman, Mary Hill, Ap-
pellant.**

Gen. No. 20,258. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed March 11, 1915. Additional opinion filed April 22, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Women's Catholic Order of Foresters v. Hill et al., 191 Ill. App. 629.

Statement of the Case.

Bill of interpleader filed by the Women's Catholic Order of Foresters against Mary Hill and Jennie Oetzman, defendants, to determine the ownership of a fund of \$1,000 admitted by plaintiff to be due under an endowment certificate issued by it to Mrs. Agnes C. Van Wazer, mother of the defendants.

In 1896, Mrs. Van Wazer became a member of one of the subordinate lodges of the plaintiff, and an "endowment certificate" for \$1,000 was issued to her, payable to her husband. Her husband dying, a new certificate was issued, at her request, payable to her daughter, Mary Van Wazer, now Mrs. Hill. At the time this was done Mrs. Van Wazer told the secretary of defendant that her daughter Mary "had always done what was right," while the others had not; that "Mary was the only one of the family that was deserving of the insurance," and was the only one that she (Mrs. Van Wazer) "could trust;" that she (Mrs. Van Wazer) "wanted \$100 for masses out of the money," and "a headstone laid at her grave," and that she wanted Mary to attend to these things after her death. Mary agreed to do so. Mrs. Van Wazer then said: "Now Mary, if I cannot pay the dues, you will have to pay them, for the money is going to be yours:" and to this Mary also assented. After this arrangement was made, Mary paid, out of her own money, most of the dues as they accrued during her mother's lifetime.

In September, 1911, the certificate was placed by Mrs. Van Wazer in a safety deposit box, rented for that purpose by Mrs. Hill at her mother's request and it remained there until the death of Mrs. Van Wazer, on February 12, 1913.

Mrs. Van Wazer suffered from chronic asthma for some years before her death, and about a week before her death she had an attack of bronchial pneumonia. During this last illness, her son, Peter Van Wazer, and her daughter Jennie, now Mrs. Oetzman, were living

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at the home of the insured. Three days before Mrs. Van Wazer died she told the secretary that she would like to change her policy "to Jennie without Mary knowing it," and asked how this could be done. The by-laws of the society provided that any member in good standing may surrender her certificate at any time and have a new one issued, payable to such beneficiaries as she may direct by indorsing such surrender and request on the back of the certificate. The by-laws also provide that if the certificate be lost, a new certificate "payable to the same or a new beneficiary" will be issued "upon making an affidavit of the facts in the case satisfactory to the high secretary." The recording secretary suggested that the latter course be followed, and told Mrs. Oetzman, who was present, to go to the high court and get a blank form of affidavit to the effect that the certificate was lost. Both the insured and Mrs. Oetzman knew that the certificate was not lost, but was in the possession of Mrs. Hill, and was payable to her. Mrs. Oetzman went to the main office of the association and obtained from the high secretary a printed blank form of affidavit as to the loss of the certificate. In the forenoon of February 10, 1913, a notary who had been summoned to the home of the insured filled in the blanks in the affidavit, which stated that the insurance certificate was lost; that the insured had made diligent search to find it but could not; that she desired a new certificate to be issued, payable to her daughter, Jennie Oetzman. Mrs. Oetzman and Peter Van Wazer testified that this affidavit was then signed by the insured and by them as witnesses. The notary did not testify.

This affidavit was offered in evidence, and the original is a part of the record on appeal. It is dated February 10, 1913, but purports to have been sworn to on February 11, 1913. The signature of the insured is a series of scrawling, irregular marks, bearing not the slightest resemblance to her signature as she wrote it in April, 1910 (which is also in the record).

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Mrs. Oetzman and Peter Van Wazer testified that their mother, who was then between sixty and seventy years of age, and was very sick, was sitting in a chair at the time this affidavit was signed; that the notary read the whole affidavit to her and asked her if she knew what she was doing, and if she was doing it willingly, to which she replied in the affirmative. The attending physician testified that the physical and mental condition of Mrs. Van Wazer at that time was such that he doubted if she could understand the purpose of such an affidavit.

The affidavit thus executed was delivered by Mrs. Oetzman the same day to the recording secretary, who, after submitting it to a meeting of the court held the same afternoon, mailed it to the officers of the high court. The latter received it on the morning of February 11th, and on February 13th (after the death of the insured), a new certificate payable to Mrs. Oetzman was issued, and was delivered to her several days later. The only dues or assessments paid by Mrs. Oetzman were dues, amounting to \$3.15, which accrued about a week before the death of the insured. Mrs. Hill was ill at her home at that time, and at no time during the last illness of the deceased did Mrs. Oetzman or Peter Van Wazer communicate the fact of their mother's illness to Mrs. Hill, and Mrs. Hill, had no knowledge of that fact, or of the fact that any change had been made in the certificate, until after her mother's death.

From a decree awarding the fund to Mrs. Oetzman, Mrs. Hill, the other defendant appeals.

O'DONNELL & O'DONNELL, for appellant, Mary Hill.

THOMAS G. McELLOGOTT, for appellee Jennie Oetzman.

ADOLPH H. EASTER, for appellee, Women's Catholic Order of Foresters.

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MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 825*—*when substitution of new beneficiary invalid.* Where the insured has once designated an eligible beneficiary and caused a certificate to be issued payable to such beneficiary and the latter has paid dues upon the faith of the certificate in pursuance of an agreement to that effect with the insured, the beneficiary so named acquires a beneficial interest in the certificate and the substitution of another beneficiary without the knowledge of the one first named is fraudulent and will not be permitted, in a court of equity, to defeat the rights of the beneficiary first named.

2. INSURANCE, § 857*—*when proceeding to determine ownership of proceeds of certificate equitable.* A bill of interpleader by an insurer to determine the ownership of the proceeds of a life insurance certificate as between the beneficiary named in the certificate first issued and the one substituted in a later certificate is a suit in equity in which equitable as well as legal rights will be recognized and protected.

3. INSURANCE, § 825*—*when procuring issue of new certificate fraud.* By means of a false affidavit that the original certificate had been lost, the issuance of a new certificate was secured by the insured from the insurer in which a person assisting in securing its issuance and knowing the facts was substituted for the original beneficiary, who had paid the dues according to agreement with the insured. It was held that the issuance of the certificate was a fraud upon both the insurer having no knowledge of the fraud and upon the original beneficiary and that the new beneficiary knowingly participating in the fraud would not be allowed to profit thereby in a court of equity.

4. WITNESSES, § 107*—*when beneficiary under insurance certificate not incompetent to testify to conversation with deceased insured.* On a bill of interpleader by an insurer to determine the right to the proceeds of a life insurance certificate as between two daughters of the insured, one of whom claimed as beneficiary under the original certificate and the other as substituted beneficiary under a certificate issued later, both of the claimants are competent witnesses to testify in their own behalf as to any conversation with the insured deceased which is otherwise competent, relevant or material.

ON ADDITIONAL OPINION.

5. INTERPLEADER, § 19*—*when attorney's fees allowable.* While a court of chancery in the exercise of its general equity powers cannot allow solicitor's fees to the party filing a bill of interpleader,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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where the by-laws of an interpleading beneficial society expressly provided that when more than one claimant demands the endowment benefit provided for, there shall be deducted from such benefit "all court costs, reasonable attorney's or solicitor's fees, and all actual expenses incurred by this order in determining who should be paid said benefits", a reasonable solicitor's fee may be allowed, provided the complainant acts in good faith in filing the bill.

6. INTERPLEADER, § 19*—*limitation on attorney's fees allowable.* Where the parties by their contract, stipulate that a reasonable solicitor's fee may be deducted or allowed in case an interpleader becomes necessary, the fee so allowed should not include the value of any services beyond the mere preparation and filing of the bill, attending to the service of process, and the preparation and entry of an interlocutory order finding that the bill was properly filed and requiring the complainants to interplead.

Thomas M. Hunter, Bailiff for use of W. R. Holligan and J. W. Rodgers, Defendants in Error, v. The Empire State Surety Company and Margaret M. Gillette, Plaintiffs in Error.

Gen. No. 20,393.

1. JUDGMENT, § 170*—*how rendition and entry distinguished.* The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict. The entry of the judgment is the ministerial act of enrolling or recording the judgment rendered.

2. JUDGMENT, § 238*—*when nunc pro tunc judgment in replevin suit admissible in suit on replevin bond.* The only record made of a judgment in a replevin suit in the Municipal Court of Chicago, at the time of its rendition, was an abbreviated minute of the proceedings entered on a docket. In the suit upon the replevin bond the judgment was alleged, in the affidavit of defense to be void because not entered in the English language. Thereafter an order was entered in the replevin suit by a judge other than the one who rendered the judgment, directing that the judgment rendered in the replevin suit be recorded, in full form, *nunc pro tunc* as of the date it was rendered. *Held*, that the record of the judgment as entered *nunc pro tunc* was admissible in evidence in the suit on the replevin bond.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. JUDGMENT, § 238*—*what judge may order judgment entered nunc pro tunc as rendered.* Any judge of the Municipal Court of Chicago may direct the entry *nunc pro tunc* as of the date and in the form which it was entered of a judgment of that court which has not been properly entered but of which a proper minute has been preserved.

4. REPLEVIN, § 119*—*when evidence of motion in Appellate Court in replevin suit admissible in suit on bond.* In a suit on a replevin bond it is proper to admit in evidence a motion made in the Appellate Court by one of the appellants to set aside the judgment of affirmance by that court and the order denying such motion.

5. EVIDENCE, § 27*—*when admission of evidence of attorney of party not reversible error.* While the courts do not favor the practice of an attorney for a party to an action testifying in favor of his client, he is not disqualified as a witness, and an objection to his testimony goes to its weight and not to its competency, and permitting him to testify is not reversible error, especially where he has first withdrawn his appearance and his evidence relates to matters which it would be difficult to prove in any other way.

6. REPLEVIN, § 204*—*when evidence as to value of services of attorneys admissible in suit on bond.* In a suit on a replevin bond it is not error to admit evidence as to the value of the services of two attorneys in the replevin suit, where there is evidence tending to prove that there was more work than could be properly done by one attorney and that defendant in the replevin suit authorized one of the attorneys to employ his partner to assist in the trial.

7. REPLEVIN, § 191*—*when instruction as to employment of two attorneys proper.* In a suit on a replevin bond it is not error to instruct the jury that they are to determine whether the services of two attorneys were reasonably necessary in defending the replevin suit, where there was evidence tending to prove that there was more work than one could do properly and that the defendant in the replevin suit authorized one of the attorneys to employ his partner to assist in the trial.

8. WITNESSES, § 21*—*when not qualified to testify.* In a suit on a replevin bond given in a replevin suit for an automobile, the fact that one called as a witness as to the value of the car was, at the time of the replevin suit, an "automobile repair man" in the garage in which the car was kept and that two years later he engaged in the business of buying and selling automobiles does not qualify him to testify as to the value of the car at the time of the replevin suit, where it appears that before engaging in the business he had never bought nor sold an automobile and that he did not know of any sale of a car like the car in question.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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9. REPLEVIN, § 171*—*when conditional tender of return of property insufficient.* In a suit on a replevin bond, where the only tender to return the property made before the trial is the offer in the affidavit of merits to return it "if it should be found and held that said replevin judgment is valid," in which affidavit it is also claimed that the judgment is invalid, it is not error to refuse to permit the defendants to make a formal offer, at the close of all the evidence, to return the property.

10. TRIAL, § 195*—*when refusal of instruction to find for plaintiff proper.* Evidence examined and held to warrant denial of motions at the close of plaintiff's evidence and at the close of all the evidence to instruct the jury to find for the defendants.

11. REPLEVIN, § 190*—*when interest recoverable in suit on bond.* Where the plaintiff in a suit on a replevin bond recovers judgment, interest is properly allowed.

12. NEW TRIAL, § 122*—*when refusal of motion not reviewable.* Where the bill of exceptions does not show that a motion for a new trial was made, the question whether the verdict was contrary to the preponderance of the evidence cannot be reviewed.

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed March 11, 1915.

Statement by the Court. In January, 1909, Harold Gillette, a minor, by his mother and next friend, Margaret M. Gillette, brought a replevin suit in the Municipal Court of Chicago against the Kramer Motor Car Company to recover the possession of an automobile. Mrs. Gillette and the Empire State Surety Company executed a replevin bond in the sum of \$3,000 to the bailiff of that court and a replevin writ was issued, under which the bailiff took possession of the automobile and turned it over to Harold Gillette. The Motor Car Company pleaded property in W. R. Holligan and J. W. Rodgers, and upon a trial before the court without a jury a judgment was rendered on April 7, 1909, in favor of the defendant for costs and a return of the property. The only record of this judgment made at that time in the Municipal Court consisted of an abbreviated minute of the proceedings entered upon the docket of the court. From this judg-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ment an appeal was taken to the Appellate Court, where the judgment was affirmed. *Gillette v. Kramer Motor Car Co.*, 163 Ill. App. 93.

In November, 1911, suit was brought upon the replevin bond above mentioned against Mrs. Gillette and the Surety Company. They filed an affidavit of merits, stating, in substance: First, that Harold Gillette was a minor at the time the replevin suit was tried, and that the trial of that suit by the court without a jury was a violation of his constitutional right to a trial by jury; second, that the judgment in the replevin suit was void because it was not "entered" in the English language, but in abbreviated characters; third, that if the replevin judgment was valid, the damages accruing on the bond did not exceed the sum of \$330. In March, 1912, an order was entered striking from the files the first paragraph of the affidavit of merits, relating to the alleged constitutional right of trial by jury.

On March 15, 1912, an order was entered in the replevin suit, which recites that after due notice and an examination of the records, files and papers in that suit, the court finds that through error or inadvertence, the clerk of the court had failed to enter of record in full form, "the findings, proceedings and judgment had and rendered" therein on April 7, 1909, and thereupon it was ordered that such findings, proceedings and judgment (which are set forth in full in the order) be entered of record *nunc pro tunc* as of April 7, 1909.

At the trial of the suit on the replevin bond the plaintiff offered in evidence the affidavit for replevin, the replevin writ and the replevin bond; also the record of the judgment in the replevin suit, as entered *nunc pro tunc* on March 15, 1912; also the order of the Appellate Court affirming the replevin judgment; also a motion entered in the Appellate Court by Harold Gillette after he became of age, to set aside the order of affirmance upon the ground that his constitutional right of trial by jury had been invaded, and the

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order of the Appellate Court denying said motion. Objections to each of these items of documentary proof were overruled and the defendants excepted. Evidence was then offered by both sides as to the value of the automobile, attorneys' fees, etc., and numerous objections were made, which will be referred to in the opinion. At the close of the plaintiff's evidence, and also at the close of all the evidence, defendants requested peremptory instructions in their favor, which were refused and exceptions duly preserved. The jury returned a verdict in favor of the plaintiff, fixing the debt at \$3,000 and the damages at \$1,656.27, and judgment was entered on the verdict. The defendants sued out a writ of error from the Supreme Court. That court, in February, 1914 transferred the cause to this court.

HARRIS F. WILLIAMS, for plaintiffs in error.

FREDERICK ARND, for defendants in error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

In the opinion filed by the Supreme Court (*Hunter v. Empire State Surety Co.*, 261 Ill. 335), the court held that the constitutional questions raised by plaintiffs in error are not involved in this suit, for the reason that the proceedings and judgment in the replevin suit, even if erroneous, were not void and cannot be collaterally attacked in this suit on the replevin bond.

It is urged that the trial court erred in admitting in evidence the order—called by counsel for plaintiffs in error an “expanded judgment”—entered in the replevin suit on March 15, 1912. The ground of the objection is that this order was entered, “long after the court had lost jurisdiction of the replevin suit,” by a judge who did not try the case, and was therefore (it is said) “a mere nullity.” Counsel for defendants in error objects to the use of the words “expanded

judgment." We see no harm in using those words to express in brief form what was in fact done at the time the order of March 15, 1912, was entered. When the judgment was pronounced, or "rendered," on April 7, 1909, a memorandum or minute of that fact was written upon the docket, either by the judge who pronounced it, or by his minute clerk. This memorandum or minute, while in abbreviated form, is perfectly intelligible to every lawyer or clerk who is at all familiar with court records and minutes. With this minute as a guide, any clerk who is competent to write court records could readily "expand" it into the technical form of a judgment for the defendant in replevin; and a comparison of the minute with the order of March 15, 1912, shows that the judgment then ordered to be entered of record *nunc pro tunc* was in fact the judgment actually rendered on April 7, 1909, as shown by the minute.

There is a clear distinction recognized by the authorities between the *rendition* of a judgment and the *entry* of it. "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict. The entry of a judgment is a ministerial act which consists in spreading it upon the record or writing it at large in a docket or other official book." (23 Cyc. 835.) In construing a statute using both these words, our Supreme Court said: "The words '*rendered*' and '*entered*' are plainly used antithetically, and each in its distinctive correct legal sense,—'*rendered*' being used to indicate the giving of judgment, and '*entered*' to indicate the act of placing the judgment *rendered* on record,—in other words, enrolling or recording it." *Blatchford v. Newberry*, 100 Ill. 484, 489. The same distinction was pointed out by Mr. Justice Moran, in *Jasper v. Schlesinger*, 22 Ill. App. 637, in the following language (p. 641): "It could not be said that there was no judgment because the judgment order had not been spread out at

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length upon the judgment record. *The judgment is a fact from the moment it is pronounced by the court,* and the clerk's duty is to record such judgment before the final adjournment of the term 'or as soon thereafter as practicable.' R. S., Chap. 25, Sec. 14." In the same opinion it is also said (p. 640): "It is not the practice of the court in rendering judgment in any case at common law to write out the formal order at length, nor is it the practice for the minute clerk to write out such order in his minutes, but such memorandum is made as clearly indicates what the judgment of the court is."

The entry that was made on the docket of the Municipal Court on April 7, 1909, was a memorandum of that character. It was not a judgment. The judgment was a fact, however, from the moment it was pronounced by the court, and the memorandum made at that time, while it was neither itself the judgment nor a formal record of the judgment, was a sufficient minute of the proceedings to enable the clerk to enter the judgment of record in proper form. It has been repeatedly held that where such a memorandum or minute is made by the clerk or the judge upon some official book, document or paper at the time a judgment is pronounced, the court may at any time thereafter, by an order entered *nunc pro tunc*, cause the record to show in proper, technical form the judgment that was, in fact, *rendered* by the court. *Gebbie v. Mooney*, 121 Ill. 255; *Chicago, M. & St. P. Ry. Co. v. Walsh*, 150 Ill. 607; *Metzger v. Morley*, 197 Ill. 208. In the case last cited, the court quotes with approval the following from Freeman on Judgments, sec. 61: "The entry of a judgment *nunc pro tunc* is always proper when a judgment has been ordered by the court but the clerk has failed or neglected to copy it into the record." The only qualification of this rule is that the subsequent order must be based upon "some note or memorandum from the records or *quasi* records of the

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court, or by the judge's minutes, or some entry in some book required to be kept by law, or in the papers on file in the cause." *Wesley Hospital v. Strong*, 233 Ill. 153.

In *Metzger v. Morley*, *supra*, the trial judge made the following entry upon his minutes at the time of the trial: "Trial by jury and verdict for \$1521.09, and motion by defendant for new trial; motion overruled and judg. on verdict for \$1521.09; and appeal prayed and allowed; bond in \$3,000 in 20 days, to be approved by clerk by agreement; b. of e. in 120 days." At the same time, the clerk made the following entry: "And judgment on the verdict for \$1,521.09." Three years later, upon motion and due notice, and upon an inspection of these minutes, the court entered an order in which, after reciting that a judgment had been "pronounced and rendered" on a certain day three years before, in favor of the plaintiff and against the defendant, for the sum of \$1,521.09, and costs, and that the clerk "had failed to enter of record said judgment in full and proper form," it was ordered that the clerk enter said judgment of record "in full and proper form" as of the date said judgment was, in fact, "pronounced and rendered." On appeal this order was sustained. The Supreme Court held that the minutes of the judge and the clerk were amply sufficient to authorize the entry of the order and judgment *nunc pro tunc*, saying: "To hold otherwise would be to deprive the court of the power to make its record speak the truth under any and every circumstance."

The order in question in the present case is similar to the order entered in the case last cited, and upon the authority of that case and the others cited above, we think there was no error in admitting the so-called "expanded judgment" in evidence. The *nunc pro tunc* order was the record evidence of the judgment as pronounced by the court on April 7, 1909. The mere fact that such order was entered by another judge than the

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one who actually tried the case is immaterial. We see no reason—and none has been suggested—why any judge of the Municipal Court may not direct the entry of an order of this character in any case in which such a minute has been preserved. The trial judge could only cause such a record to be made or amended in pursuance of some sufficient note or memorandum found upon the records or quasi records of the court. He could not do so from his personal recollection. Therefore, the judge who entered the order had before him the same means of information and had the same authority in the matter as the trial judge.

It is next urged that the trial court erred in admitting in evidence the motion of Harold Gillette in the Appellate Court to set aside the judgment of affirmance, and the order of that court denying said motion. It was proper to show that the proceeding in the Appellate Court had been finally disposed of, and, while the evidence in question was perhaps unnecessary, we fail to see how the defendants were, or could be, in any manner prejudiced thereby. Counsel for plaintiffs in error say that “the jury was bound to get the impression that the Appellate Court was against the position taken by the defendants.” It appears that the grounds of the motion urged in the Appellate Court were the same, in substance, as those which the Supreme Court held were not involved in this case. Hence, if it be assumed that the jury might have received the impression stated, that impression was evidently correct, and not a good cause of complaint.

It is insisted that the court erred in permitting one of the plaintiff's attorneys to testify for the plaintiff over objection. There is no merit in the contention. While the practice of allowing attorneys to testify in cases in which they appear as counsel has often been criticised and is not to be encouraged, yet they are not disqualified, and an objection to such testimony goes only to its weight and not its competency. *Wetzel v. Firebaugh*, 251 Ill. 190; *Wilkinson v. People*, 226 Ill.

135. Furthermore, the witness in question withdrew his appearance as an attorney in this case, and most of his testimony related to the amount of work done by the attorneys in the replevin suit, which it would probably have been difficult to prove by any witness not subject to the same objection.

It is next claimed that the court erred in admitting evidence as to the value of the services of two attorneys in the replevin suit, and in instructing the jury that they were to determine whether the services of two attorneys were reasonably necessary in defending the replevin suit. There was evidence tending to prove that there was more work to do than could be properly done by one attorney, and that the defendant in the replevin suit authorized one of the attorneys to employ his partner to assist in the trial. Under the circumstances, we think there was no error in the ruling of the court in this particular.

One Robert P. Tyk was called by the defendants as one of three witnesses as to the value of the automobile. He testified that in 1909 he was an "automobile repair man" at a garage in Chicago where the machine in question was kept; that two years later he engaged in the business of buying and selling automobiles, but prior to that time he had never bought or sold an automobile nor did he know of any sale that had been made of a car like the one in question. The court refused to permit him to testify as to the value of the machine in 1909, on the ground that no sufficient qualification had been shown. We think there was no error in the ruling; for the witness did not claim to know anything (except from hearsay) about the value of automobiles similar to the one in question at the time the same was taken on the replevin writ, and any estimate of value he might have given under such circumstances would have been a mere guess, tending rather to confuse than to enlighten the jury.

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It is claimed that the court erred in refusing to permit the defendants to make a formal offer, at the close of all the evidence, to return the automobile. The defendants did not attempt to show that any such offer had been made prior to the trial, except as such an offer is contained in one sentence of the second affidavit of merits. The offer made in that affidavit was, "which automobile the defendants hereby tender and offer to return to the plaintiff *if it should be found and held that said replevin judgment is valid.*" As defendants claimed, by another sentence of the same affidavit, that the judgment was invalid, the offer so made was not an unconditional offer, and even this offer was omitted from the amended affidavit of merits that was filed later. In our opinion, the offer to return was properly excluded.

It is urged that the court erred in denying the motions made at the close of the plaintiffs' evidence and at the close of all the evidence to instruct the jury to find for the defendants. This alleged error raises only the question whether there was any evidence in the record fairly tending to prove all the material averments of the plaintiffs' declaration, or statement of claim. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206. There can be no question, we think, that there was evidence tending to support all the material allegations of the statement of claim. It follows that the court did not err in refusing the motions.

An objection is made, but not argued, in the briefs as to the allowance of interest. No error in this respect is pointed out, and we see none. Interest was recoverable by the express terms of the statute. B. S., ch. 74, sec. 2 (J. & A. ¶ 6691).

It is finally suggested, rather than argued, that the court erred in overruling the defendants' motion for a new trial. The bill of exceptions does not show that any such motion was made. The clerk's transcript of the judgment purports to recite that such a motion

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was made and overruled, but it has been so frequently and uniformly held that such a recital is not properly a part of the record that no citation of authority is necessary. Therefore, the question whether the verdict was contrary to the preponderance of the evidence was not properly preserved for review.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

Affirmed.

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